

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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5 In the Matter of:

6 DPH HOLDINGS CORP., ET AL CASE NO. 05-44481-rdd

7 Debtors.

8 - - - - -x

9 In the Matter of:

10 ACE AMERICAN INSURANCE COMPANY ET AL

11 v CASE NO. 09-01510-rdd

12 DELPHI CORPORATION ET AL

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15 U.S. Bankruptcy Court

16 300 Quarropas Street

17 White Plains, New York

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19 October 16, 2012

20 10:08 AM

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22 B E F O R E:

23 HON. ROBERT D. DRAIN

24 U.S. BANKRUPTCY JUDGE

25 ECRO - WILLIE RODRIGUEZ, ET AL

1 HEARING re Notice of Agenda - Proposed Seventh-Ninth Omnibus  
2 Hearing Agenda

3

4 HEARING re Notice of Agenda - Proposed Fifty-Seventh Claims  
5 Hearing Agenda

6

7 HEARING re Adversary Proceeding - Defendant's State of Michigan  
8 Worker's Compensation Agency and State Michigan Funds  
9 Administration's Statement Pursuant to Local Rule 7056-1 of  
10 Undisputed Facts in Support of Their Motion for Summary  
11 Judgment (related document(s) 148)

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13 Affidavit of Kevin A. Elsenheimer (related document(s) 147,  
14 148) filed by Melanie L. Cyganowski on behalf of State of  
15 Michigan Funds Administration, State of Michigan Workers'  
16 Compensation Insurance Agency (related document(s) 159)

17

18 Declaration of Richard G. Haddad, Esq. in support of Defendants  
19 State of Michigan Workers' Compensation Agency's and State of  
20 Michigan Funds Administration's Motion for Summary Judgment and  
21 in Opposition to Plaintiffs' Motion for Summary Judgment  
22 (related document(s) 150)

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1 Memorandum of Law of Michigan Workers' Compensation Agency and  
2 Michigan Funds Administration in Support of their Motion for  
3 Summary Judgment and in Opposition to Plaintiffs' Motion for  
4 Summary Judgment (related document(s) 151)  
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6 Opposition/Defendants State of Michigan Workers' Compensation  
7 Agency's and State of Michigan Funds Administration's Responses  
8 to Plaintiffs' Rule 7056-1 Statement and Statement of Disputed  
9 Facts that precludes Summary Judgment in favor of Plaintiffs  
10 (related document(s) 152)  
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12 Motion for Summary Judgment Statement of Undisputed Facts  
13 (Related document(s) 39, 38, 37, 40) filed by Robert G. Kamenec  
14 on behalf of ACE American Insurance Company, Pacific Employers  
15 Insurance Company (related document(s) 41)  
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17 Motion for Summary Judgment Memorandum of Law (related  
18 document(s) 40)  
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20 Motion for Summary Judgment Statement of Undisputed Facts  
21 (related document(s) 39, 37, 38)  
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23 Motion for Summary Judgment filed by Robert G. Kamenec on  
24 behalf of ACE American Insurance Company, Pacific Employers  
25 Insurance Company (related document(s) 38)

1 Motion for Summary Judgment Statement of Undisputed Facts  
2 (related document(s) 37, 38) filed by Robert G. Kamenec on  
3 behalf of ACE American Insurance Company, Pacific Employers  
4 Insurance Company (related document(s) 39)

5

6 Motion for Summary Judgment filed by Robert G. Kamenec on  
7 behalf of ACE American Insurance Company, Pacific Employers  
8 Insurance Company (related document(s) 38)

9

10 Motion for Summary Judgment Notice filed by Robert G. Kamenec  
11 on behalf of ACE American Insurance Company, Pacific Employers  
12 Insurance Company (related document 37)

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25 Transcribed by: Sheila Orms

1 A P P E A R A N C E S:

2 DUANE MORRIS LLP

3 Attorneys for the ACE Insurance and Pacific

4 1540 Broadway

5 New York, NY 10036

6

7 BY: WILLIAM C. HEUER, ESQ.

8 LEWIS OLSHIN, ESQ.

9 CATERINE BEDEMAN, ESQ.

10

11 FIRST ASSISTANT ATTORNEY GENERAL

12 Attorneys for the State of Michigan

13 Labor Division

14 5th Floor

15 G. Mennen Williams Bldg.

16 525 West Ottawa Street

17 Lansing, MI

18

19 BY: DENNIS J. RATERINK, ESQ.

20

21

22

23

24

25

1 OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C.

2 Attorneys for Michigan Defendants

3 230 Park Avenue

4 New York, NY

5

6 BY: RICHARD G. HADDED, ESQ.

7 MELANIE L. CYGANOWSKI, ESQ.

8

9 PLUNKETT COONEY

10 Attorneys for ACE Insurance and Pacific

11 38505 Woodward Avenue

12 Suite 2000

13 Bloomfield Hills, MI

14

15 BY: ROBERT G. KAMENEC, ESQ.

16 ELAINE M. POHL, ESQ.

17

18 ALLISON & BIRD LLP

19 Attorneys for ACE Insurance

20 90 Park Avenue

21 New York, NY

22

23 BY: MARTIN G. BUNIN

24

25

1 SKADDEN ARPS SLATE MEAGHER & FLOM

2 Attorneys for DPH Holdings Corp

3 4 Times Square

4 New York, NY 10036

5  
6 BY: LOUIS C. CHIAPPETTA, ESQ. (TELEPHONICALLY)

7 AL HOGAN, ESQ.

8  
9 TELEPHONIC APPEARANCES:

10  
11 SEAN CORCORAN, DELPHI CORPORATION

12 MICHAEL P. DOUD, JAMES GRAI

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P R O C E E D I N G S

THE COURT: Please be seated. All right. Good morning, DPH Holdings.

MR. OLSHIN: Your Honor, Lou Olshin for ACE American Insurance Company and Pacific Employers Insurance Company. Do you prefer that we speak from the podium or?

THE COURT: Wherever you're comfortable.

MR. OLSHIN: Well, since as Your Honor knows there are a lot of documents here --

UNIDENTIFIED: I'm sorry, are we taking appearances are we're just getting ready?

THE COURT: Well, people can state their name or should state their name and who they represent when they speak.

MR. DOUD: Michael Doud on behalf of James Grai, Your Honor, good morning.

THE COURT: And that actually prompts something. We have both the omnibus and the claims hearing agenda. There's really nothing on the claims hearing agenda, correct?

MR. HOGAN: Your Honor, this is Al Hogan for DPH Holdings. I believe that the summary judgment proceedings in the ACE matter are the only thing that's --

THE COURT: The only thing that's on?

MR. HOGAN: That's correct.

THE COURT: Which is in the omnibus agenda?

MR. HOGAN: That's correct.



1 THE COURT: All right. So we should go ahead with the  
2 dueling summary judgment motions and I'll hear from the  
3 insurers first.

4 MR. OLSHIN: Thank you, Your Honor, good morning. As  
5 Your Honor indicated we're here on ACE/Pacific's motion for  
6 summary judgment and the Michigan Defendant's Cross Motion.

7 ACE/Pacific asked the Court for three forms of relief  
8 in its motion for summary judgment. First, with respect to the  
9 deductible policies, we asked for a declaration that they did  
10 not provide coverage for Delphi Corporation self-insured  
11 operations. Alternatively and related to the first claim was a  
12 request for the remedy of reformation in the event that that  
13 remedy was appropriate.

14 And third, we asked that the retention policies be  
15 declared that they do not drop down, that is, that they don't  
16 provide coverage until their self-insured retention amounts are  
17 satisfied.

18 Just a few housekeeping items. We believe that it's  
19 undisputed that with respect to the first issue, related to the  
20 deductible policies, that the undisputed facts show that there  
21 was no deductible policy issued for the period October 1, 2002  
22 to October 1, 2003, and therefore, summary judgment is  
23 appropriately entered with respect to that deductible policy.

24 Next, with respect to the third issue, with respect to  
25 the retention policies, we've not seen any contest or argument

1 contrary to the legal authorities we provided with respect to  
2 the retention policies. And, therefore, we believe it's  
3 appropriate that under Michigan law the Court enter summary  
4 judgment that those retention policies do not drop down and  
5 that they don't provide coverage until their self-insured  
6 retention limits are satisfied.

7 Your Honor, I'd like to --

8 THE COURT: Well, before we move on, both of those  
9 points seem to me to be correct, but let me hear from the  
10 Michigan defendants on that.

11 MR. HADDAD: Yes, good morning, Your Honor, Richard  
12 Haddad from Otterbourg, Steindler, Houston & Rosen. I'll be  
13 speaking on behalf of the Michigan defendants.

14 With me this morning is my colleague and partner,  
15 Melanie Cyganowski, Dennis Raterink from the Attorney with the  
16 Michigan Funds Administration, and I'd also like to introduce  
17 Your Honor to Kevin Elsenheimer, who is the Director of the  
18 Workers' Compensation Agency and one of the three trustees of  
19 the Michigan Funds Administration.

20 With respect to those points, I'm not sure what  
21 summary judgment there is to give on the 2002/2003 because we  
22 don't know that there is a policy, but we certainly don't  
23 contest that there is a deductible policy or that there is a  
24 policy for that 2002/2003 year.

25 THE COURT: Okay. Well, but I thought the only basis

1 for the request -- the only defense to the request for summary  
2 judgment is that deductible policies provide for coverage.

3 MR. HADDAD: Except for that one year.

4 THE COURT: Oh, okay. So that's --

5 MR. HADDAD: So what Mr. Olshin began was saying as to  
6 one particular year --

7 THE COURT: Right.

8 MR. HADDAD: -- and --

9 THE COURT: But is there any other basis for that  
10 particular year?

11 MR. HADDAD: No.

12 THE COURT: Okay. All right.

13 MR. HADDAD: But with respect to the excess  
14 policies --

15 THE COURT: Right.

16 MR. HADDAD: -- we do agree and there is common ground  
17 that there is no drop down. In other words, to the extent that  
18 it is a policy in excess of \$5 million of underlying liability,  
19 then it should be enforceable and in accordance with its terms  
20 to cover liability in excess of the \$5 million.

21 THE COURT: Okay.

22 MR. HADDAD: And I think there is -- that is our  
23 position.

24 THE COURT: All right. So partial summary judgment  
25 should be granted then on the insurers' motion on those two

1 points, i.e., that Ace and Pacific have no liability for the  
2 October -- it was October?

3 MR. OLSHIN: It's October 1, 2002 to October 1, 2003.

4 THE COURT: October 1, 2002 to October 1, 2003 period  
5 under any policy and secondly, that they should be granted a  
6 partial summary judgment on whether -- on the request for a  
7 declaration that there's no liability under the retention  
8 policies until the applicable SIR is satisfied.

9 MR. OLSHIN: Thank you, Your Honor. Appreciate  
10 getting those housekeeping items resolved up front.

11 I'd like to turn now to what remains with respect to  
12 the deductible policy issues. Over the course of the last  
13 several years, Your Honor knows that there have been pleadings  
14 filed by both the Michigan defendants, the Agency and the  
15 Funds, and Delphi Corporation in all of those pleadings have  
16 indicated that Delphi Corporation was self-insured in the State  
17 of Michigan.

18 There's also been pleadings that have been filed with  
19 Your Honor that Delphi and ACE/Pacific intended that the  
20 majority of the operations of Delphi Corporation in the State  
21 of Michigan be self-insured, and that only small subsidiaries  
22 that did not obtain self-insured authority be covered under the  
23 deductible policies.

24 What I and my colleagues wanted to try to do today,  
25 Your Honor, is accomplish several things. One, I wanted to

1 provide Your Honor with an analytical framework to assist the  
2 Court in trying to organize the material that the Court's been  
3 provided with, to the extent that there is any questions with  
4 respect to specific policies. I'm here to deal with those.

5 To the extent the Court needs additional information  
6 with respect to affidavits or other evidentiary issues, my  
7 partner, Bill Hauer will address those issues, and to the  
8 extent we need to get to the issue of reformation, Mr. Kamenec  
9 from the Plunkett Cooney law firm will get to those issues.

10 I think the analytical framework to sort of put into  
11 focus the information that the Court's been provided with  
12 really present the following issues. The first issue, since  
13 we've talked about this Delphi insurance program and its  
14 structure is, whether under Michigan law the Delphi insurance  
15 program structure is appropriate; i.e., whether the law permits  
16 a qualified self-insured parent to insure 90 so percent of its  
17 operations and then leave other affiliates or subsidiaries to  
18 obtain insurance under a deductible program because those  
19 affiliates or subsidiaries have not obtained self-insured  
20 authority. I think that's the first issue.

21 I think the second issue, Your Honor, is what is the  
22 source of that authority for that structure. If, in fact, you  
23 can create a structure like that, is there authority under  
24 Michigan law to allow a Court to conclude that it's  
25 appropriate.

1           The third issue I think is if there is authority, and  
2           it is lawful, how does a carrier and an insured utilize or  
3           apply that authority to achieve the intended result. And I  
4           think, Your Honor, that the fourth issue, which is the issue  
5           that we sort of delve into with a lot of documents is did that  
6           intended result actually occur.

7           Now, as an overview to the first issue, that is  
8           whether it's appropriate under Michigan law to have the Delphi  
9           insurance program as it was structured, I think the Court as an  
10          overview can consider Mr. Elsenheimer's testimony in his  
11          deposition found at pages 133 and 134, and Mr. Strock (ph), who  
12          I understand was the administrator of the funds at pages 23 and  
13          24. DPH Holdings attached those transcripts as Exhibit A and B  
14          to their papers, which is document 165 in the adversary  
15          proceeding.

16          And both Mr. Strock and Mr. Elsenheimer agree that a  
17          parent company like Delphi Corporation can obtain self-insured  
18          authority, and have certain subsidiaries or affiliates that are  
19          not self-insured.

20          So we know in the first instance that at least the  
21          director of the agency and the director of the funds agree that  
22          the road that ACE and Pacific and Delphi Corporation went down  
23          back in 2000 to create the structure is something that actually  
24          Michigan law recognizes.

25          THE COURT: Well, they don't agree they went down that

1 road, but I think they do agree that you can -- if you do it  
2 properly, you can do it, right?

3 MR. HADDAD: Yes, Your Honor, you can do it; of  
4 course, as the document show, as the evidence that we've shown  
5 establishes, that's not what they did.

6 THE COURT: All right. I understand.

7 MR. OLSHIN: Now, to me it's somewhat ironic and we'll  
8 get into the specifics that the State of Michigan and the  
9 Agencies and the Funds were all participants in how the program  
10 actually operated. And they were participants in the following  
11 respects. One, they approved the policy through the Michigan  
12 Insurance Department that ACE and Pacific utilized, and that  
13 comes from the affidavit of Mr. Grody, who was involved in that  
14 approval process. That's reply Exhibit 2.

15 They granted Delphi Corporation self-insured authority  
16 through an application process whereby Delphi Corporation  
17 designated those entities for which it asks that self-insured  
18 authority be granted, and they designated for purchase by  
19 Delphi Corporation the terms of the retention policies that ACE  
20 and Pacific actually issued. And those documents can be found  
21 in reply Exhibit 6, 7, 17, 18, 29, 30, 31 and 32.

22 When we look at how the authority and structure is put  
23 together under the statute and what ACE and Pacific did, one  
24 must I think, begin with the statute. And the relevant statute  
25 we believe is MCL 418 621 and there's two parts to that

1 statute, Your Honor.

2 There is a section -- well, there's at least two that  
3 are relevant to our discussion, a Section 2 and a Section 4.  
4 And I have copies of statutes in this small binder because it  
5 may be helpful to look at.

6 THE COURT: That's okay.

7 MR. OLSHIN: Now, the Michigan defendants really never  
8 discuss MCL 418.621(2), nor do they discuss the provisions of  
9 the ACE Delphi policy other than the Michigan insurance -- I'm  
10 sorry, the Michigan law endorsement. And they don't really  
11 discuss any of the other conditions in that policy. And we  
12 think it is important to give focus to those provisions.

13 While the Michigan defendants have attempted to allude  
14 to this concept of double coverage and whether it's permissible  
15 or not, we think the real legal issue is whether Michigan law  
16 allows an insurer to issue a deductible policy which does not  
17 insure approved self-insured employers and locations. We think  
18 the answer to that is definitely yes. We think it's controlled  
19 by 418.621(2), and we think the Michigan defendants have, in  
20 fact, indicated that that is an appropriate structure.

21 THE COURT: Right. No, they've agreed to that.

22 MR. OLSHIN: Now, when you read that statute, it  
23 provides, the State Accident Fund and each insurer issuing an  
24 insurance policy to cover any employer not permitted to be a  
25 self-insurer under 611, shall insure, cover and protect in the



1 same policy all businesses, employees, enterprises, and  
2 activities of the employer.

3 Thus, under the statute, the obligation for an insurer  
4 to insure all businesses does not apply to a self-insured  
5 employer, and did not apply to the Delphi Corporation itself.

6 THE COURT: Right. It's not based on corporate groups  
7 or anything like that. It's by an individual employer.

8 MR. OLSHIN: Yes, Your Honor. In fact, there is a  
9 statute that I believe specifies under Michigan law that an  
10 employer is defined as an entity that basically employs, I  
11 think it's, three or more employees. My Michigan counsel is  
12 shaking their head in the affirmative.

13 So we then turn to the Michigan law endorsement  
14 argument. And we believe, Your Honor, that that argument is  
15 based on a misreading of one portion of the statute. The  
16 Michigan law endorsement is actually found in 418.621 paragraph  
17 4. So in order to interpret that statute, one must give effect  
18 to the wording of the entire statute, in particular 618.621(2).

19 And Michigan law requires under its ruling of  
20 statutory interpretation that the Court must begin with the  
21 statute's language. If the statute is clear and unambiguous,  
22 the Court assumes that the legislature intended its plain  
23 meaning, and the Court should enforce the statute as written.  
24 That's the People versus Stone case, 463 Michigan 562, 621 NW2d  
25 702, it's a Michigan Supreme Court case from 2001.

1 And the Supreme Court in Michigan has further said  
2 that in reviewing the statute's language, every word has to be  
3 given meaning, and a Court should avoid a construction that  
4 would render any part of the statute surplusage or nugatory.  
5 And that's the Wickens versus Oakwood Healthcare System case,  
6 465 Michigan 53, 31 NW2d 686, Michigan 2001, and the Altman  
7 versus Meridian Township case, at 439 Michigan 623, 487 NW2d  
8 155.

9 Thus, Your Honor, in order to examine the Michigan law  
10 endorsement, the language of which is set forth 48.621(4), you  
11 must read it in the context of the entire statute because it is  
12 part of that statute, and a complete reading of the entire  
13 statute does not support the Michigan defendants' reading.

14 Firstly, the Michigan law endorsement as noted, is one  
15 paragraph. And when you read it in combination with paragraph  
16 2, it's clear from the language in paragraph 2 that insurers  
17 are not required to insure all of the businesses and employees  
18 of a self-insured employer like Delphi. And accordingly,  
19 ACE/Pacific and Delphi Corporation did not do so.

20 Reading paragraph 4 in this context, and giving the  
21 meaning to the entire statute, it's clear that paragraph 4, the  
22 Michigan law endorsement applies to the issuance of an  
23 insurance policy to those employers who are not authorized as  
24 self-insured. Accordingly, it only applies to the subsidiaries  
25 of Delphi Corporation named in the Michigan extension of

1 information page which were authorized not to be -- I'm sorry,  
2 which were not authorized to be self-insured.

3 THE COURT: Well, I guess the one area here that I'm  
4 not sure the Michigan defendants agree with you on is whether  
5 the endorsement literally only applies to entities that are not  
6 self-insured or whether instead it applies to any entity where  
7 there is, in fact, third party insurance. I.e., they say, you  
8 could have self-insurance and insurance both. And if you have  
9 both, I think they're saying the endorsement applies to the  
10 extent of the insurance supplied by the third party.

11 MR. OLSHIN: Well, I think Your Honor --

12 THE COURT: Is that your summary of where you are?

13 MR. HADDAD: Yes, Your Honor, and I can speak to, you  
14 know, the 621.2 point or I can wait until Mr. Olshin has  
15 completed.

16 THE COURT: Okay.

17 MR. HADDAD: But whatever Your Honor prefers.

18 THE COURT: What is your response to that?

19 MR. OLSHIN: My response, Your Honor, is that you have  
20 to read the endorsement as a whole and the policy as a whole.

21 THE COURT: Can I interrupt you?

22 MR. OLSHIN: Yes.

23 THE COURT: I think they would agree with you that the  
24 fact that ACE or some other insurer provides insurance to  
25 subsidiary X, does not mean that under the Michigan rule

1 endorsement, it's somehow sucked in to providing insurance to  
2 every subsidiary or every business related to subsidiary X, but  
3 only to subsidiary X. I think they'd agree with that, right?

4 MR. HADDAD: Yes.

5 THE COURT: It's not some black hole that you get  
6 pulled into by if you provide insurance to any entity. On the  
7 other hand, I think they would say that if you do agree to  
8 provide insurance to subsidiary X, then you have -- then you're  
9 stuck with the Michigan endorsement for that subsidiary --

10 MR. OLSHIN: Well --

11 THE COURT: I think you don't agree with -- I don't  
12 think you disagree with either?

13 MR. OLSHIN: No, we agree that the Michigan law  
14 endorsement, the first line of which, refers the reader to the  
15 information page of the policy because it says in the Michigan  
16 law endorsement that this endorsement is part of the policy  
17 because the information page at item 3(a) --

18 THE COURT: Well, let's not get into the information  
19 page.

20 MR. OLSHIN: Well --

21 THE COURT: I'm just now talking about the statute. I  
22 don't think the statute --

23 MR. OLSHIN: I'm talking about the statute, Your  
24 Honor, and I'm talking about it in the context that the statute  
25 is clear that an insurer is not insuring self-insured

1 employers. So the way the endorsement --

2 THE COURT: I'm not sure I agree with that. Does it  
3 actually say that an insurer can never insure self-insured  
4 employers? I don't think that's right.

5 MR. OLSHIN: I think what it's saying is that the  
6 language of the statute is that you're issuing a policy that's  
7 not covering self-insured employers, and the way we know that  
8 is that the Michigan Insurance Department approved the general  
9 section of the policy which indicates under the location  
10 section that it doesn't cover self-insured locations.

11 THE COURT: Yeah, but that's a separate -- that's a  
12 contract interpretation issue. I'm just focusing on the  
13 statute right now. I think that, again, the Michigan  
14 defendants agree with you that the Michigan endorsement  
15 statute, which is echoed in the Michigan law endorsement in the  
16 policies, does not pull an insurer into insuring every  
17 subsidiary or affiliate of an insured, and that it only  
18 requires the insurer to provide the coverage for its insured.

19 And so I think you both agree on that. What I'm  
20 trying to explore is whether you contend that the Michigan  
21 statute literally says it's a binary choice, you either are  
22 self-insured, in which case the Michigan law endorsement  
23 doesn't apply, or you're insured, but you can never be covered  
24 by the Michigan law endorsement for a subsidiary that is self-  
25 insured even if you've issued insurance for that subsidiary.

1 And I think that's where they would disagree with you, because  
2 they're saying, under the policies, you did issue insurance for  
3 these entities.

4 MR. OLSHIN: And I'm saying several things. One, I'm  
5 saying that 621(2) in combination with 418.611, which provides  
6 the either or choice of coverage provides the writing of this  
7 policy so that in fact it doesn't cover and protect in that  
8 same policy all businesses, employees, enterprises and  
9 activities of the self-insured employer.

10 And secondarily I'm saying, that considering the  
11 policy, and I don't think you can separate out, Your Honor, one  
12 page from a 400 page policy that has an insuring agreement  
13 which excludes self-insured locations which is consistent with  
14 418.621(2). So these pieces of the policy, again all approved  
15 by the Michigan Insurance Department, work in combination.

16 THE COURT: All right. So it's not -- it's really not  
17 418.621(4) you're relying on. You're relying on the 418.611.

18 MR. OLSHIN: Well, I'm relying on 611 and I'm also  
19 relying on 621(2).

20 THE COURT: But --

21 MR. OLSHIN: And I'm relying on the wording of the  
22 endorsement itself, which says, go to the information page of  
23 the policy, look at item 3(a). Item 3(a) lists Michigan. Now  
24 in some years, in fact, the 2001 --

25 THE COURT: All right. Before we get to the policy, I

1 just think we should nail this down. I don't see a statutory  
2 basis in 418.621(2) or (4) for saying that the Michigan  
3 endorsement doesn't apply to any insurer that insures a self-  
4 insured debtor company. I just don't -- it's not there.

5 MR. OLSHIN: Well, Your Honor, we --

6 THE COURT: I mean it gives you authority. It does  
7 say that the endorsement only applies where you're issuing  
8 insurance. I get that. It's covered by the policy. But I  
9 don't see the corollary argument that I think you're trying to  
10 make, which is that if you provide a policy to a self-insured,  
11 you don't have to comply with 621. I mean --

12 MR. OLSHIN: Well, I think 621(2) --

13 THE COURT: -- how do you even get to that?

14 MR. OLSHIN: -- says to cover any employer not  
15 prevented to be a self-insured. And it's saying it's a self-  
16 insurer, you don't have to cover and protect in the same  
17 policy, all the businesses, employees, and enterprises.

18 THE COURT: But 621(2) doesn't say anything about the  
19 endorsement.

20 MR. OLSHIN: Well --

21 THE COURT: It just says that --

22 MR. OLSHIN: I think our point, Your Honor, is you  
23 can't read 621(4) in a vacuum. You have to read it in  
24 combination with the very section of the statute which proceeds  
25 item 4. Because it's saying in the Michigan law endorsement

1 that it's providing coverage in accordance with the policy.  
2 When you look at the policy, the policy's general section  
3 provides that self-insured locations aren't covered. When  
4 you --

5 THE COURT: But, wait, that's not in 621, right? What  
6 in 621 says that?

7 MR. OLSHIN: Well, the endorsement that they're  
8 relying upon says that.

9 THE COURT: No, but -- all right. I'm going to do  
10 this very slowly, okay, maybe I'm missing something here. 621,  
11 paragraph 2 says "The state accident fund and each insurer  
12 issuing an insurance policy to cover any employer not permitted  
13 to be a self-insurer, shall insure, cover and protect in the  
14 same insurance policy all the businesses, employees,  
15 enterprises, and activities of the employer."

16 Okay. So you're saying here that this requirement  
17 only applies where you're not permitted to be a self-insurer?  
18 That's really what you're saying?

19 MR. OLSHIN: Yes.

20 THE COURT: Okay.

21 MR. OLSHIN: If you're a self-insurer, then under  
22 621(2) you don't have an obligation in the policy to insure,  
23 cover, and protect in the same policy all the businesses. And  
24 that's not overridden by 621(4). And 621(1) talks about  
25 insurance --



1 THE COURT: But can I stop you?

2 MR. OLSHIN: Yes.

3 THE COURT: 2 says that you have to, unless the  
4 employer is a self-insurer --

5 MR. OLSHIN: Correct.

6 THE COURT: -- the insurer issuing the insurance  
7 policy for the employer has to cover everything, okay. Has to  
8 cover --

9 MR. OLSHIN: Then if you're not a self-insured --

10 THE COURT: -- all the businesses, employees,  
11 enterprises, and activities of the employer.

12 MR. OLSHIN: I just want to make sure I understand  
13 what Your Honor said. So if you posit the hypothetical where  
14 you issue a policy to an entity that's not an approved self-  
15 insurer --

16 THE COURT: Right.

17 MR. OLSHIN: -- you cover everything.

18 THE COURT: Right.

19 MR. OLSHIN: We agree with that. Because the --

20 THE COURT: You can't just cover half the employees,  
21 you have to cover them all.

22 MR. OLSHIN: Right. Because the intent of the  
23 Michigan law endorsement which is similar in most states --

24 THE COURT: Well, let's stop for a second.

25 MR. OLSHIN: -- is you don't want an employee to move

1 or an employer to move employees to some other location --

2 THE COURT: Right.

3 MR. OLSHIN: -- and create some sort of a false  
4 employer and --

5 THE COURT: Right.

6 MR. OLSHIN: -- say they're not covered under the Act.

7 THE COURT: Right, okay.

8 MR. OLSHIN: That's the intent.

9 THE COURT: It does not say that you may not issue  
10 insurance. You may not issue a policy to an entity that is a  
11 self-employer -- I mean, a self-insurer. It doesn't prohibit  
12 the issuance of insurance to an entity that is a self-insurer.

13 MR. OLSHIN: Well, I think 621(1) says your issuance  
14 of compensation provided in this Act, and the compensation  
15 provided in this Act takes you to 611. 611 --

16 THE COURT: Well, before we get to 611, I just want to  
17 focus on 621.

18 MR. OLSHIN: I am focusing on 621.

19 THE COURT: Okay.

20 MR. OLSHIN: Because I'm saying you have to read --

21 THE COURT: All right.

22 MR. OLSHIN: -- all the sections --

23 THE COURT: But before we get there --

24 MR. OLSHIN: -- of the --

25 THE COURT: -- I think your argument does depend on

1 interpretation of 611, but I want to make sure that that's the  
2 only thing it depends on. Because when you go -- so 2 does not  
3 prohibit the issuance of insurance for a self-insurer, except  
4 by one's reference to the other provisions of this Act, right?  
5 There's nothing in 2 that prohibits the issuance of -- by ACE  
6 of insurance to a self-insurer.

7 MR. OLSHIN: Well, it doesn't use the word prohibit  
8 but I think the fair meaning of that is it's talking about  
9 insurers that are issuing insurance policies to employers who  
10 are not authorized self-insurers.

11 THE COURT: Okay.

12 MR. OLSHIN: That's what I think 2 is saying.

13 THE COURT: All right. That's fine. And then 4 says,  
14 "each policy of insurance covering worker's compensation shall  
15 contain this endorsement." So, I mean, unless some other  
16 statutory provision prohibits the issuance of a policy to a  
17 self-insured, then I think 4 applies.

18 MR. OLSHIN: Well, we don't think it applies because  
19 we think one, 621(1) talks about every contract for insurance  
20 of the compensation provided in this Act.

21 THE COURT: Right.

22 MR. OLSHIN: And when you go to 611, which talks about  
23 what are the options of what kinds of insuring arrangements are  
24 appropriate, that's where you get into the either or concept.

25 THE COURT: Well, it doesn't say or. It doesn't say

1 or.

2 MR. OLSHIN: Well, it's either you're an employer who  
3 obtains insurance through a private insurer --

4 THE COURT: Right.

5 MR. OLSHIN: -- or you're an authorized self-insurer,  
6 and the Michigan defendants pointed out, you can also have a  
7 pooling arrangement for authorized self-insurers, but that's  
8 not really relevant to this case.

9 THE COURT: But it doesn't say "or," so I think you're  
10 putting a lot of emphasis on the "either" and suggesting that  
11 this is in the disjunctive. I mean no one's cited any cases to  
12 say that you're prohibited from doing this. Right?

13 MR. OLSHIN: Well, I think we cited the McQueen case  
14 where someone tried to argue that somehow there was a drop down  
15 and they found there wasn't one because under the statute, you  
16 can't read 621(4) in the self-insured arena to require a drop  
17 down.

18 THE COURT: Okay. But that's -- because the statute  
19 -- because the policy didn't have a drop down.

20 MR. OLSHIN: Well, they were trying to argue there was  
21 one, and they obviously came to the conclusion that there  
22 wasn't. And that 621(4) didn't require that there was a drop  
23 down.

24 THE COURT: Okay. But I mean we know that, and in  
25 fact, this happened with the retention policies. Under the

1 statute, Michigan can require a self-insured to get more  
2 insurance, to get insurance from a third party, among other  
3 things.

4 MR. OLSHIN: They could only require certain forms of  
5 insurance. They can't require the obtaining of a deductible  
6 policy. If you read the statute, it's very direct that the  
7 type of security or policies that the Michigan defendants, and  
8 particularly the Agency or Funds, could require an approved  
9 self-insured to obtain as a condition of obtaining that  
10 approval.

11 THE COURT: Well, which -- can we turn to that  
12 section?

13 MR. OLSHIN: I need to find it for Your Honor, but  
14 there is a section that provides that. I apologize not to have  
15 it handy.

16 THE COURT: I probably do need your book on this one.

17 UNIDENTIFIED: 611(1)(a).

18 MR. OLSHIN: Huh?

19 UNIDENTIFIED: 611(1)(a).

20 MR. OLSHIN: 611(1)(a).

21 THE COURT: Oh, okay.

22 MR. OLSHIN: Yeah, it says, "If the director  
23 determines it to be necessary, the director shall require the  
24 furnishing of a bond or other security in reasonable form and  
25 amount. Such security as may be required by the director may

1 be provided by furnishing specific excess insurance, aggregate  
2 insurance coverage through a carrier authorized to write in the  
3 state in an amount acceptable to the director, a security bond,  
4 an irrevocable letter of credit in the format acceptable to the  
5 bureau, and claims payment guarantees."

6 So they're not talking about deductible policies, and  
7 the reason they're not is because as Your Honor will recall  
8 from the insurance agreement motion, when you obtain this kind  
9 of deductible policy, the insured is required to post  
10 collateral to secure the deductible obligation.

11 So the program would not make any sense in terms of  
12 self-insurance if the Michigan defendants could approve self-  
13 insured authority, assess the insured on the basis of granting  
14 that authority, and then require the insured to obtain what is  
15 a fairly significant cost-sensitive product, a deductible  
16 policy, which requires, in and of itself, collateral.

17 So that concept sort of butts heads against one  
18 another because the employer then would say, why get self-  
19 insured authority if I have to buy a deductible policy, I'll  
20 just buy a deductible policy. It would make no sense to  
21 have --

22 THE COURT: Well, if the State felt that it needed  
23 more assurance that there would actually be payment because of  
24 the financial condition of the insured.

25 MR. OLSHIN: Well, they could do what was authorized

1 in the statute. They could either one, preclude them from  
2 being a self-insured, which then would force them into a  
3 deductible program, which would make sense. Or allow them to  
4 -- or require them like occurred here, to purchase a self-  
5 insured retention policy which comparatively is significantly  
6 less expensive than having a deductible. Because the other  
7 sort of conflict here is to say the Funds will collect for a  
8 period of time, I think the numbers are when you add them up  
9 from our reply exhibits, \$6.6 million. While we obtain premium  
10 of \$14,000 based on our charging premium to the small  
11 subsidiaries that weren't authorized to be self-insured.

12 And then to come full circle and say, guess what,  
13 Delphi, we collected these assessments for 9 or 10 years, but  
14 you, ACE, take the risk.

15 THE COURT: Well, let me -- I want to explore that  
16 too. But -- on the premiums. But on the issue of whether  
17 418.611(1) precludes using more than one of the three methods,  
18 Mr. Eisenberger (ph) says in his declaration that, in fact,  
19 there are many instances where a self-insured also has  
20 insurance.

21 MR. OLSHIN: I think the ratio, as I understand the  
22 numbers, is something like a comparison of roughly 2,000 to  
23 200.

24 THE COURT: Right. But it's not -- I guess the issue  
25 is, they don't seem to think it's precluded by the statute.

1 MR. OLSHIN: Well, I think the reality is that they  
2 looked at some records, and some of the records they gave us  
3 basically said, oh, you know what, you're self-insured up to  
4 point A, and then the period of self-insurance was like 1 to 30  
5 days, where it apparently appeared that the employer  
6 transitioned from a period of self-insured approval to a period  
7 of obtaining private insurance.

8 So I don't think you can draw any conclusion as to the  
9 legality based on those records. I think all you can do is  
10 look at it and say, can you issue a policy and is it  
11 appropriate under Michigan law to issue a policy where you're  
12 not insuring all of the entities because they are self-insured.  
13 And I think the answer is yes, and our policy gets you there  
14 when you consider all of its terms and conditions.

15 THE COURT: Well, no, that's -- I mean, that's -- I  
16 thought you were going somewhere else, which is we're precluded  
17 from insuring self-insured entities.

18 MR. OLSHIN: Well, we think we are precluded, and we  
19 think we're precluded because that's the way the Michigan  
20 Insurance Department approved our policy.

21 THE COURT: Well, except they -- Mr. Elsenheimer says  
22 they've approved other policies where there's insurance for  
23 self-insureds.

24 MR. OLSHIN: Well, I don't think there's any evidence  
25 that there's been an approval.



1 THE COURT: That's --

2 MR. OLSHIN: I think the only evidence is what  
3 occurred with respect to the ACE specific policy, which is the  
4 policy that was approved. And whether they approved, even if  
5 they did, some other policy formulation is really irrelevant --

6 THE COURT: Well, no, he says, "In fact, I'm aware of  
7 other entities in addition to Delphi who were both approved  
8 self-insurers and who have also obtained coverage from a third  
9 party insurer."

10 MR. OLSHIN: Well, maybe, Your Honor, I misinterpreted  
11 your statement. What I was responding to is the fact that our  
12 policy approved by the Michigan Insurance Department versus  
13 Grody reply Exhibit 2, provides what it does. And what it  
14 provides is that self-insured locations are not insured.

15 THE COURT: Okay. But that's -- again, I'm just --

16 MR. OLSHIN: No, I understand but I think --

17 THE COURT: You all made a statutory argument besides  
18 the interpretation of the policy.

19 MR. OLSHIN: We did --

20 THE COURT: The statutory -- and the statutory  
21 argument is that, in fact, Delphi or the Delphi entities that  
22 were self-insured were prohibited from obtaining third party  
23 insurance.

24 MR. OLSHIN: And that's what we think the statutes in  
25 combination mean.

1 THE COURT: Okay.

2 MR. OLSHIN: And that's why we think our policy was  
3 written the way it was written and approved the way it was  
4 approved.

5 THE COURT: Okay. Now, on the latter point, there is  
6 a contradictory statement in the evidence, so it really just is  
7 a matter of statutory interpretation for purposes of a summary  
8 judgment motion.

9 MR. OLSHIN: I don't think there is any contradictory  
10 evidence about the approval of insurance policies. There may  
11 be this small universe of entities that Mr. Elsenheimer is  
12 saying somehow obtained what they considered to be double  
13 coverage. But that doesn't mean that -- we've never seen those  
14 policies.

15 THE COURT: Right.

16 MR. OLSHIN: We don't know what they say whether  
17 approved, not approved.

18 THE COURT: Well, no, but that's what a trial would be  
19 for.

20 MR. OLSHIN: Well, I don't think you need a trial on  
21 that point because I think what you have to determine is what  
22 does this policy say.

23 THE COURT: Well, okay, that's a separate point.  
24 We'll get to that, believe me. Then on the -- but I'm sure Mr.  
25 Haddad will address the "either" and whether it means

1 disjunctive or not.

2 But the second point, you were talking about the  
3 unfairness on the premiums.

4 MR. OLSHIN: I'm saying the evidence is undisputed,  
5 that Delphi never paid a premium for a deductible policy that  
6 covered all of Delphi --

7 THE COURT: Right, \$14 or \$316.

8 MR. OLSHIN: I think it's like \$14,000 that they  
9 paid --

10 THE COURT: A total of \$14,000 but for individual  
11 policies it was tiny.

12 MR. OLSHIN: Correct.

13 THE COURT: So on that score, I think what the  
14 Michigan defendants argue is the following. That was perfectly  
15 appropriate as a premium when it looked like Delphi was going  
16 to be the primary one, that it was going to pay because it was  
17 in good financial shape, and Delphi was just getting this extra  
18 policy as a back-up. And that's why the premium would be so  
19 low because in all likelihood Delphi would pay. What is your  
20 response to that?

21 MR. OLSHIN: Well, my response is several points. One  
22 is they certainly didn't assess their self-insured assessments  
23 on that basis, that oh, there's the possibility of double  
24 coverage here. So therefore, we will charge Delphi a less  
25 amount than --

1 THE COURT: On its --

2 MR. OLSHIN: On its assessments on the basis that  
3 somehow there's double coverage. Because these forms, of  
4 course, were at the Agency, according to them, since the year  
5 2000.

6 My second response would be is that it's clear from  
7 the documentation that the only premiums assessed were the  
8 premiums assessed for the non-approved self-insured employers,  
9 and you know that, Your Honor, from the Michigan information  
10 pages which sets forth the individual entities and with respect  
11 to those individual entities, it sets forth the individual  
12 premiums.

13 So you know just looking at the very -- you don't even  
14 have to go outside to extrinsic evidence, you know from looking  
15 at reply Exhibits 11, 12, 21, 37, 22, 23, and 24, when you find  
16 the Michigan extension of information pages, that the entity  
17 reference on Reply Exhibit 11 for 2000 to 2001 deductible  
18 policy, Packard Hughes Interconnect and Delphi Diesel System  
19 Corp, which were the only two entities listed and the only  
20 premiums calculated for, that there was no indication that the  
21 entire company was being insured and rated.

22 Similarly, if you go to the 2001/2002 policy, which is  
23 Reply Exhibit 12, you'll find the specific entities Allied  
24 Single Environmental Catalyst, Packard Hughes Interconnect,  
25 Delphi Diesel System Corporation with the individual

1 calculation of what their estimated premium is. Again, no  
2 reference at all to a premium calculation for the entire  
3 Delphi.

4 And that's true with respect to all of the policies  
5 that are provided in Reply Exhibits 11, 12, 21, 37, 22, 23 and  
6 24.

7 THE COURT: So if -- and then your second point I  
8 guess is that if at this point the two insurers were found to  
9 have insured not only the self -- I'm sorry, the non-self-  
10 insured entities against which those premiums were calculated,  
11 but the self-insured ones as well, the insurers would be left  
12 holding the bag because they're stuck with the premiums they  
13 paid.

14 MR. OLSHIN: We'd be left holding a bag or don't want  
15 to go there in this proceeding, we have an administrative  
16 expense claim, but.

17 THE COURT: But what is that for?

18 MR. OLSHIN: That's for potential calculation if  
19 there's some conclusion that, in fact, we have responsibility  
20 under the policies.

21 THE COURT: So would you -- you would recalculate the  
22 premiums then or?

23 MR. OLSHIN: No, I didn't say we'd recalculate it.  
24 We'd proceed with our administrative expense claim.

25 THE COURT: But how would --

MR. OLSHIN: Well, we would be left effectively not

1 being able to collect a premium that we would've collected.  
2 And not being able to collect collateral that we would have  
3 obtained to secure the deductible policies.

4 THE COURT: Well, let me make sure I understand that.  
5 Because there wasn't collateral posted?

6 MR. OLSHIN: Correct.

7 THE COURT: Then there wouldn't be collateral.

8 MR. OLSHIN: The collateral that was posted was based  
9 on the concept --

10 THE COURT: On the uninsured ones, the non-self-  
11 insured ones.

12 MR. OLSHIN: Correct.

13 THE COURT: And what would the administrative claim be  
14 for?

15 MR. OLSHIN: The administrative claim relates to  
16 claims that may -- claims that we may have to pay that would  
17 arise if, in fact, we had the exposure that the Michigan  
18 defendants are alleging we had.

19 THE COURT: But is that -- so is -- but what -- is  
20 that based on what, subrogation, or what?

21 MR. OLSHIN: That would be the amounts that would be  
22 within the deductible obligation of the policy.

23 THE COURT: The deductible amounts.

24 MR. OLSHIN: Right.

25 THE COURT: Okay. All right. Because you would be

1 paying those.

2 MR. OLSHIN: Correct. And the way the --

3 THE COURT: Under the endorsement?

4 MR. OLSHIN: Under the --

5 THE COURT: If the endorsement were said to apply,  
6 you'd be paying those deductible amounts.

7 MR. OLSHIN: Correct.

8 THE COURT: And your argument is that that's a  
9 different -- that that's not anything like a premium?

10 MR. OLSHIN: Correct.

11 THE COURT: The insurance would be based upon some  
12 theory that you'd be reimbursed for the deductible amounts?

13 MR. OLSHIN: Right.

14 THE COURT: Insurance is always based on a calculation  
15 of what an appropriate premium is.

16 MR. OLSHIN: And coming back to your question about  
17 what are the other indications that the full Delphi wasn't  
18 paying a premium, I guess we have to give some credence to the  
19 fact that Delphi, DPH Holding itself says that, in fact, was  
20 the case. That they were paying premium based upon the  
21 entities that were not authorized to be self-insured, and in  
22 addition to the policy, the other way you know that, and we  
23 supplied some of this information in the reply exhibits.

24 If you look at the Aon Delphi submission in 2001 and  
25 2004, they clearly break out Delphi as a self-insurer from the

1 small entities that they intended to be covered under the  
2 policy, and in fact, the entities that were listed on the  
3 Michigan extension of information page.

4 THE COURT: Okay. Well, I think we should next turn  
5 to the policies themselves, but before we do that, maybe it  
6 makes sense it deal with the statutory argument, the argument  
7 that 418.611 precludes self-insured entities from obtaining  
8 insurance.

9 MR. HADDAD: Your Honor, thank you, Richard Haddad.  
10 I'm happy to speak to that. We do think the issues are  
11 somewhat interrelated, but to come focus right to Your Honor's  
12 question --

13 THE COURT: Okay.

14 MR. HADDAD: -- the statute doesn't say it. The  
15 statute doesn't say it's exclusive. No case has so held that  
16 it is exclusive. McQueen certainly doesn't address the issues  
17 whatsoever. And thirdly, it's undisputed, undisputed and  
18 recognizing that we're here today on a summary judgment, it's a  
19 burden to lay bare your proof, it is undisputed that, in fact,  
20 a couple of a hundred Michigan employers choose for whatever  
21 reason to be self-insured and get third party insurance for a  
22 period of time.

23 In some instances, it's a short period of time. In  
24 other instances, it is a long period of time, and Mr.  
25 Elsenheimer references --



1 THE COURT: Well, do I know anything about the period  
2 of time? I just have I think the one paragraph in his  
3 declaration.

4 MR. HADDAD: Well, we did the --

5 THE COURT: I know both of you have been talking about  
6 this.

7 MR. HADDAD: There's one paragraph in his moving  
8 declaration that Your Honor read from. Mr. Elsenheimer also  
9 submitted on Friday, trying to think what day that was, on  
10 Friday a reply declaration, in which he put forth the list of  
11 211 employers who have chosen to be both insured and self-  
12 insured. And we produced, in response to the ACE document  
13 request, the Agency's records establishing each of those  
14 companies over a period of time.

15 THE COURT: But that list doesn't say what type of  
16 insurance it was or how long it lasted.

17 MR. HADDAD: It does so. It would show the amount of  
18 length of time because you have the documents, the State's  
19 records do reflect the point in time, both that someone's an  
20 approved self-insurer and also the point in time that they have  
21 third party insurance. So it does -- the documents that we  
22 produced do reflect that. What we've attached to the affidavit  
23 is the list, the list of employers.

24 THE COURT: But the list of -- I mean, I don't have  
25 that. I don't have the list of the names.

1 MR. HADDAD: You don't have the list of the names,  
2 that's correct. We didn't give you the burden. There was  
3 hundreds and hundreds of pages of records that show that this  
4 happens. You know, does every employer choose to do it, no,  
5 everyone doesn't choose to do it.

6 And I think Your Honor's questions of Mr. Olshin did  
7 answer -- address some of those points, that both 611 does not  
8 preclude it, it is not exclusionary. 621 similarly --

9 THE COURT: Well, before we --

10 MR. HADDAD: Okay.

11 THE COURT: Before we get -- I mean, just on 611 --

12 MR. HADDAD: Yeah.

13 THE COURT: -- what is your response to his point that  
14 paragraph 1 seems to limit what the commissioner can impose on  
15 a self-insured when there's a feeling of financial insecurity.  
16 Would you say that's just dealing with that specific situation?

17 MR. HADDAD: I think it does. It says, you can  
18 require an excess policy which was done here. It doesn't say  
19 you can't do other things, but putting that aside, the question  
20 here is not what was -- you know, whether Delphi was required  
21 to be both self-insured and to get insurance. But, in fact,  
22 what is Your Honor to do when presented with a situation where,  
23 in actuality, Delphi was both insured and got self-insurance.  
24 Because 621(4) says, "Each policy of insurance covering  
25 worker's compensation in this state shall contain the following

1 provisions." It doesn't say --

2 THE COURT: So it's just tied to a policy. It  
3 doesn't --

4 MR. HADDAD: Each policy. It's not limited to each if  
5 you're self-insured or if you're not self-insured, it says  
6 each. And 621(2) that Mr. Olshin referenced, and I think Your  
7 Honor read the whole section, and I think it's correct to read  
8 the entirety of 621(2) because you can't just stop halfway  
9 through, and certainly can't assume the converse, which is what  
10 the ACE argument is here.

11 But what 621(2) says is that if you are not an  
12 approved self-insurer, then you can only get a single policy.  
13 If they want the same insurance policy, the company wants to  
14 make sure you get -- the state wants to make sure that if  
15 you're not a self-insurer, you get one policy, the same single  
16 policy that covers all the businesses within the state. 621(2)  
17 is not limited of 621(4). If anything, 621(4) is expansive,  
18 because 621(4) reads very clearly, each policy of insurance  
19 covering worker's compensation shall contain the following  
20 provisions.

21 And, in fact, and in fact, as a matter of contract,  
22 and I know Your Honor doesn't want to jump to the contract just  
23 yet, but in fact, each policy that we're talking about today  
24 contains those very policy provisions signed by the authorized  
25 agent of ACE and incorporated in and made part and parcel of

1 each and everyone of those policies.

2 THE COURT: Okay. All right. So why don't we turn to  
3 the policies which --

4 MR. OLSHIN: I'd be happy to do, Your Honor. I would  
5 like to respond to one thing in clarification of opposing  
6 counsel. And that was the statement that each policy in 621(4)  
7 includes even retention policies. That's just fundamentally  
8 wrong, because in fact, you can look at all of our retention  
9 policies. None of them have the Michigan law endorsement, and  
10 the reason they don't have the Michigan law endorsement is  
11 because of 621(2). Because those are policies that are issued  
12 to self-insured employers and the way the Act we believe works  
13 is in combination between 621(1), (2) and (4) and 611, you're  
14 basically picking one of the two systems because 621(4) is not  
15 an override of any of the other sections. You have to read it  
16 in combination with it. And that's what Michigan statutory  
17 construction law provides for.

18 MR. HADDAD: May I just --

19 THE COURT: yes.

20 MR. HADDAD: Just -- and I don't like to interrupt,  
21 but to --

22 THE COURT: No, that's --

23 MR. HADDAD: -- focus Your Honor specifically on this.  
24 The excess policy is not a provision of worker's compensation,  
25 it's a reimbursement provision designed to provide additional

1 protection to the State to make sure that they're good for any  
2 liability that exceeds the underlying amounts on the primary  
3 insurance.

4 So the excess policies don't have this endorsement,  
5 but that's just not the nature of what excess policy is. I  
6 mean, if everybody went -- if an insurer went belly up, the  
7 self-insurance is still responsible. I mean, you know, you  
8 have to look at it -- what's the nature of excess insurance.  
9 It doesn't alleviate the underlying liability and we've agreed  
10 as to what the effect of the excess insurance is here in this  
11 case.

12 MR. OLSHIN: Well, I was --

13 THE COURT: Let me just --

14 MR. OLSHIN: I was responding to the comment that  
15 somehow you could read 621(4) to include -- and the use of the  
16 word "each" as having some sort of expansive reach as to  
17 everything, and it clearly does not. And that's why we believe  
18 that our interpretation of the statute is correct.

19 THE COURT: Well, the -- I mean, the retention  
20 policies do refer to worker's compensation, that's what they  
21 cover.

22 MR. HADDAD: Well, as opposed to, you know, a car  
23 crash or a D&O or anything else, sure, that's -- and they  
24 reference an amount in excess of a -- you have to come -- you  
25 have to tie it back to some factual scenario clearly, you know,

1 a particular type of insurance.

2 THE COURT: But the -- I mean, 621(4) says, "Each  
3 policy of insurance covering worker's compensation."

4 MR. HADDAD: But it's excess. It's not the primary  
5 level of coverage. And if the excess carrier were to go belly  
6 up, it doesn't relieve the self-insurer. I mean, that's sort  
7 of the credit risk that the State takes, when they assess the  
8 self-insurance application.

9 MR. OLSHIN: Which really, Your Honor, I think gets to  
10 the point in 621(1) that talks about "insurance of the  
11 compensation provided in this Act," and in the case of a self-  
12 insurer like Delphi Corporation, neither the deductible policy  
13 nor the retention policy was providing compensation to self-  
14 insurers because that worker's compensation is not required  
15 under the Act, because they become authorized self-insurers.

16 THE COURT: Okay. So why don't we turn to the  
17 policies then. My exhibit book is a little bit out of order,  
18 it has 2001 and then 2008.

19 MR. OLSHIN: Well, it's not out of order, I did that  
20 purposely.

21 THE COURT: Well, no, I was going to say out of order  
22 chronologically, but I think I understand the reason.

23 MR. OLSHIN: All right. So perhaps I could run Your  
24 Honor through.

25 THE COURT: Okay.

1 MR. OLSHIN: If you have -- do you have the binder  
2 that has Reply --

3 THE COURT: Yeah.

4 MR. OLSHIN: -- Exhibit 11 in it?

5 THE COURT: Well, I have the binder with all the  
6 policies in it, so.

7 MR. OLSHIN: All right.

8 THE COURT: That's what I've marked up.

9 MR. OLSHIN: Well, I'll refer --

10 THE COURT: The first one is Exhibit 11 which is in  
11 this binder which is the 2000 policy.

12 MR. OLSHIN: Right. What we tried to do, Your Honor,  
13 if you attempted to navigate the CD, you'll know that these  
14 policies are like I don't know, 2 or 300 pages long because as  
15 Your Honor is aware, Delphi had operations throughout the  
16 United States, and these were multi-state policies that were  
17 designed to cover specific Delphi operations in those states  
18 that didn't that didn't qualify as self-insurers.

19 So the way this policy is set up, if you begin with  
20 the 2000 policy, is you have the first page which is Bates  
21 number ACE policy 00254, and in this case, you'll see on the  
22 information page which we term it item 1, the insured, Delphi  
23 Automotive System Corporation, and you have some handwriting  
24 above it, that says Packard Hughes, Delphi Diesel, see audit.  
25 It's a little hard to read see audit, but I think that's what

1 it says.

2 And then you have under the classifications the  
3 various states that are insured under this policy or the  
4 operations in the insured, and you'll notice that, in fact,  
5 this is a multi-state policy listing several states, one of  
6 which is Michigan where the estimated annual premium is a grand  
7 total of \$316.

8 So the question then becomes how does this --

9 THE COURT: I'm sorry. You're going to have to go  
10 back because maybe my book doesn't have everything.

11 For 2001, I have, again it's Bates stamped 00254.

12 MR. OLSHIN: Okay.

13 THE COURT: Which is -- and you're right, it says item  
14 1, the insured and it lists Packard Hughes/Delphi Diesel and it  
15 lists Delphi Automotive System Corporation.

16 MR. OLSHIN: Right. And then there's a block in the  
17 center --

18 THE COURT: And item 3 says -- 3A, "a worker's  
19 compensation insurance Part 1 of the policy --" I'm sorry, 3A,  
20 "worker's compensation insurance: Part 1 of the policy applies  
21 to the worker's compensation law of the states listed here per  
22 information page attached."

23 MR. OLSHIN: Right.

24 THE COURT: Okay.

25 MR. OLSHIN: So that is referring the reader from the



1 very first page of the policy to what is called the individual  
2 state information pages. And in this policy, if you were to  
3 look at it, you would find in alphabetical order every state  
4 beginning with Alabama through Washington. So what we've  
5 included in here is the excerpts for Michigan. When you turn  
6 to the Michigan information page, it's Bates number ACE policy  
7 00348. And you'll see in the middle section under item 3, it's  
8 designating the State of Michigan. And in the classification  
9 sections, it's listed Packard Hughes Engineering Service and  
10 then it has some information. It's basically telling you what  
11 kind of employees are being rated. For Packard Hughes, it's  
12 architects or engineers. And then it has Delphi Diesel  
13 Systems, and it lists the kinds of employees that are rated  
14 under this policy. In this case, it's sales persons,  
15 collectors, messengers, folks in that category.

16 THE COURT: Okay.

17 MR. OLSHIN: And --

18 THE COURT: How do I know that this is the Michigan  
19 information page?

20 MR. OLSHIN: Because in item 3.1, it specifies  
21 Michigan. Item 3, it says "worker's comp insurance part 1 of  
22 the policy applies to the worker's compensation law of the  
23 states listed here, Michigan."

24 THE COURT: Okay. And you're representing to me that  
25 there are other pages to this policy that would list say

1 Florida or New York or et cetera?

2 MR. OLSHIN: Yes. You know that from the very first  
3 page of the policy, 254, so if you'd opened up the CD and you  
4 walked through the policy, they're basically all set up in the  
5 same way. In the first part of the policy there is the general  
6 insuring agreement, the most relevant section of which is found  
7 at, in this policy, page 257, ACE policy 257. That has the  
8 locations provisions that I made reference to previously.

9 And if you walk through the policy, you would find  
10 state information pages for each of the states, Alabama or  
11 Arizona, California, Colorado, they're all in alphabetical  
12 order, and then eventually you would get to Michigan. And  
13 after Michigan, obviously there would be the other states.

14 But in this case, page 348 is the Michigan information  
15 page, and on that information page, you find the rating of the  
16 entities that are covered under the policy. And in this  
17 particular case, it's Packard Hughes Engineering Service and  
18 Delphi Diesel Systems.

19 And if you turn the page, you'll -- where it says,  
20 Your Honor, "premium basis, estimated total, annual  
21 remuneration," that's essentially the estimated payroll for the  
22 classification of employees under those particular employers.  
23 So you'll find that, you know, compared to the size of Delphi  
24 Corporation, you're talking about deminimus payroll. And when  
25 you calculate out the premium you'll find on the next page on

1 349, ACE policy 349, you'll go down and unfortunately in very  
2 small print, it says, "total estimated annual premium \$316."  
3 That's on sort of the right-hand column about 80 percent down  
4 the page.

5 THE COURT: Okay. So can we go back to the general  
6 section, the general terms?

7 MR. OLSHIN: Yes, sir.

8 THE COURT: Okay. So A and B both say essentially the  
9 same thing. A says, it is -- this policy, it is a contract of  
10 insurance between you (the employer named in item 1 of the  
11 information page) and us, the insurer named on the information  
12 page).

13 Then B says, "you are insured if you are the employer  
14 named in item 1 of the information page." I guess to be more  
15 complete, E says, "this policy covers all of your work places  
16 listed on 1 or 4 of the information page, and it covers all  
17 other work places in item 3A," and states, "unless you have  
18 other insurance or are a self-insured for such work places."

19 But I want to focus on A and B where it says that  
20 "this is a contract of insurance between you and the employer  
21 named in item 1 of the information page."

22 MR. OLSHIN: Uh-huh.

23 THE COURT: So if Bates 000348 is the Michigan  
24 information page, why doesn't item 1 mean that Delphi  
25 Automotive System Corporation is the insured?

1 MR. OLSHIN: Because they're the named insured on this  
2 multi-state policy.

3 THE COURT: On everything?

4 MR. OLSHIN: Correct. But as item A says in the first  
5 sentence, the policy includes, at its effective date, "the  
6 information page and all the endorsements and schedules listed  
7 therein, or listed there," I'm sorry.

8 THE COURT: All right.

9 MR. OLSHIN: So I think read in the total context,  
10 what the policy is saying is, and I agree, this is a policy  
11 which I guess one could at least say, is complex. So as you  
12 work through the pages, and look at them all in context, we  
13 think you come out in the place where you're going to the  
14 information page. Because if you look at the Michigan law  
15 endorsement, which is 353, it says at the top, "this  
16 endorsement applies only to the insurance provided by this  
17 policy," so it's talking about what's provided, because  
18 Michigan is shown in item 3A of the information page.

19 Now, in this particular policy, when you go to the  
20 first page, which is the information page, Michigan doesn't  
21 appear. What it tells you to do is to go to the individual  
22 state information page, which is the document that Your Honor  
23 and I were discussing at 348.

24 THE COURT: So if you go back to the first page of the  
25 policy --

1 MR. OLSHIN: Right.

2 THE COURT: -- which is 000254, 3A does say part 1 of  
3 the policy applies to the worker's compensation law of the  
4 states listed here, and that sends you to the information page.  
5 So I guess I understand the argument, which is that it's what's  
6 listed in 3A. Part 1 is what's really listed in 3A.

7 MR. OLSHIN: Right. And in this particular policy,  
8 there is an added endorsement which is the very last page of  
9 the section 404, which reads, "The following," and it has a  
10 number of boxes, and the first item says, "insured's name."  
11 And if you go down to the end it says, "is changed to read" and  
12 it basically provides the names Packard Hughes and Delphi  
13 Diesel.

14 THE COURT: Okay.

15 MR. OLSHIN: And so all those documents read in  
16 combination we believe are conclusive of the fact that this  
17 2000 policy was only rated for and only applies to Packard  
18 Hughes and Delphi Diesel.

19 THE COURT: And you're turning to the Michigan law  
20 endorsement?

21 MR. OLSHIN: Yes, sir.

22 THE COURT: You say that that doesn't expand the  
23 coverage because by its terms it applies only to the insurance  
24 provided by the policy.

25 MR. OLSHIN: Correct. And we believe that the

1 insurance provided by this policy is consistent with 621(2) as  
2 the policy terms and conditions were approved by the Michigan  
3 Insurance Department.

4 THE COURT: So you say that the -- obviously at the  
5 top of that endorsement, it says the named insured is Delphi  
6 Automotive System Corporation.

7 MR. OLSHIN: Correct.

8 THE COURT: But you're saying that's not the employer?

9 MR. OLSHIN: We're saying that's a self-insured  
10 employer.

11 THE COURT: But the terms of the endorsement all refer  
12 to you as the insured employer, and you're saying well, it's  
13 not insured by the policy. The only ones that are insured by  
14 the policy are --

15 MR. OLSHIN: On the information page.

16 THE COURT: -- the Hughes and --

17 MR. OLSHIN: The Michigan information page.

18 THE COURT: Right.

19 MR. OLSHIN: Yes, sir.

20 THE COURT: Which would be Delphi Diesel Systems  
21 and --

22 MR. OLSHIN: I think in this policy it's -- yes, it's  
23 Packard Hughes Engineering Service and Delphi Diesel System.

24 THE COURT: Okay. All right. I want to hear you  
25 after we're done with all of these, but I think I -- in looking

1 at these, the 2000 policy seems to fit your argument the best;  
2 maybe that's why it came first. But why don't we turn then to  
3 2001.

4 MR. OLSHIN: Yes, sir.

5 THE COURT: Okay.

6 MR. OLSHIN: It's basically set up --

7 THE COURT: And again, this is a reference to -- it  
8 has again the cross-reference in 3A on the first page, which is  
9 000741, it says "Part 1 of the policy applies to the worker's  
10 compensation law of the states listed here: per information  
11 page attached."

12 MR. OLSHIN: Correct.

13 THE COURT: And you're saying that --

14 MR. OLSHIN: That gets you to page 830.

15 THE COURT: Right, 00830, 000830, which references the  
16 State of Michigan.

17 MR. OLSHIN: Correct, yes, Your Honor. And on that  
18 document, you'll find -- in this particular case, in the 2001  
19 year, the policy Michigan information page is actually pages  
20 830 and 831, so it's actually two pages. But it's set up  
21 basically the same way in terms of, in this case, indicating  
22 that the only entity that's insured is Allied Signal  
23 Environmental Catalyst, and with respect to this policy, the  
24 premium is then calculated and you find it in the same place on  
25 831, the estimated premium is \$14.

1 THE COURT: Okay. Now, this one is different than the  
2 2011 -- I'm sorry, the 2000 exhibit because it doesn't contain  
3 the policy page endorsement; is that right?

4 MR. OLSHIN: Well, we think it's --

5 THE COURT: Policy provision page endorsement.

6 MR. OLSHIN: Well, we think it's slightly different  
7 because it doesn't have that, and on this particular  
8 information page, unlike the others that come later on in the  
9 years, Delphi Automotive Systems appears on the Michigan  
10 information page.

11 So what we did for Your Honor was to provide --

12 THE COURT: Well, I'm sorry. It appears in item 1.

13 MR. OLSHIN: It appears in item 1 on the Michigan  
14 information page.

15 THE COURT: But that's the -- it also appears on -- in  
16 the 2000 Michigan information page on item 1.

17 MR. OLSHIN: Correct. And I guess what I was pointing  
18 out is it doesn't appear in the later years --

19 THE COURT: Okay.

20 MR. OLSHIN: -- of the Michigan information page. But  
21 we think the policy terms written as a whole work the same way  
22 because you're going from the Michigan law endorsement, which  
23 is 837, and you're basically referred back --

24 MR. HADDAD: It's 835.

25 THE COURT: Sorry?



1 MR. HADDAD: It's 835, not 837.

2 THE COURT: Right.

3 MR. OLSHIN: Oh, I'm sorry, Richard, I misspoke.

4 Thank you. Where it says in the first line, "this endorsement  
5 applies only to the insurance provided by the policy holder"  
6 because Michigan is shown in item 3A of the information page.

7 THE COURT: Well, it doesn't say policy holder, it  
8 says by the policy.

9 MR. OLSHIN: By the policy.

10 THE COURT: So you're saying that the policy only  
11 applies to the 3A listed entities in the Michigan information  
12 page.

13 MR. OLSHIN: Right. And in this case, this policy  
14 information page is the same as in 2000 Michigan isn't listed.  
15 It refers you back to the page 830, which is the Michigan  
16 information page.

17 THE COURT: All right. Well, it doesn't specifically.  
18 I'm sorry, are we still on the Michigan endorsement?

19 MR. OLSHIN: I'm sorry?

20 THE COURT: What refers you back?

21 MR. OLSHIN: Maybe I --

22 THE COURT: The Michigan endorsement doesn't refer you  
23 back.

24 MR. OLSHIN: Maybe I missed your question, Your Honor.

25 THE COURT: Okay. Well, you said something refers you

1 back.

2 MR. OLSHIN: Yeah, the Michigan law endorsement says  
3 "this endorsement applies only to the insurance provided by the  
4 policy --"

5 THE COURT: Oh, in 3A.

6 MR. OLSHIN: -- because Michigan is shown in item 3A  
7 of the information page.

8 THE COURT: Right.

9 MR. OLSHIN: And when you go to the information page  
10 on this particular policy, Michigan isn't listed. What it does  
11 say, "per information page attached." So that's how you know  
12 you've got to go to page 830, which in fact, is the Michigan  
13 information page.

14 MR. HADDAD: I'm sorry, I missed that, where did it  
15 say per the -- in item 3A, where does it say per information  
16 page attached?

17 MR. OLSHIN: If you look at the --

18 THE COURT: On the first page 000741, it says "per  
19 information page attached."

20 MR. HADDAD: Right.

21 THE COURT: And then you go to 000830.

22 MR. OLSHIN: Right.

23 THE COURT: Which is 3A.

24 MR. OLSHIN: And you know that's Michigan on 830  
25 because the word Michigan appears under item 3.

1 THE COURT: Okay. So let's turn then to 2008, which I  
2 think is -- I won't say anything. Let's go to 2008 then.

3 MR. OLSHIN: That's under tab 15 of the reply  
4 exhibits.

5 THE COURT: Right.

6 MR. OLSHIN: The first page of which is 2475. And the  
7 policy is essentially set up the same way, although the front  
8 page looks a little different from the prior years.

9 THE COURT: Well, the front page doesn't send you to  
10 an information page.

11 MR. OLSHIN: Well, what it says is, part 1 of the  
12 policy -- I'm looking at 3A, applies to the worker's  
13 compensation law of the states listed here.

14 THE COURT: Right.

15 MR. OLSHIN: And the states are listed. And then item  
16 4 says, "the premium for this policy will be determined by the  
17 manual of rules classification rates and rating plans, all  
18 information required below is subject to verification and  
19 change by audit. See extension of information page  
20 classifications."

21 So you then go to something called the extension of  
22 information page classifications --

23 THE COURT: We can stop, though, for a second?

24 MR. OLSHIN: Yes, sir.

25 THE COURT: If we go again to the -- what I find to be

1 different here, although, in 2000 and 2001, first page, it says  
2 "Part 1 of the policy applies to the worker's compensation law  
3 of the states listed here, per information page attached." So  
4 it says part 1, see the information page. And that's what  
5 governs.

6 This one, item 1 says, Delphi Corporation is the  
7 insured, and then it says for other named insured, see  
8 extension of information page. So at least the implication to  
9 me of that is that they're both named insured, they're both the  
10 insured. And then item 3A just refers you to the fact that  
11 part 1 of the policy applies to the worker's compensation law  
12 of the states listed here, including Michigan.

13 So it's not as clear to me that the same construct  
14 applies, that you then go to the extension of information page  
15 and that's what governs. But even if you do go to the  
16 extension of information page, Delphi Corporation, a lot of  
17 Michigan entities are on it. So I --

18 MR. OLSHIN: I want to make sure Your Honor and I are  
19 looking at the same page.

20 THE COURT: Okay.

21 MR. OLSHIN: I'm looking at Bates number 2647,  
22 extension of information page, classifications, Michigan.

23 MR. HADDAD: I was looking at 2516.

24 THE COURT: Well, I mean, there are a lot of other  
25 pages that list --

1 MR. OLSHIN: And we'll talk about the other pages, I  
2 just want to make sure Your Honor and I are looking at the same  
3 page, so that I can answer your question.

4 THE COURT: Well, okay. As long as you go back also  
5 to --

6 MR. OLSHIN: I'd be happy to.

7 THE COURT: -- 2156 and 2519 and --

8 MR. OLSHIN: Sure.

9 THE COURT: -- 2520, 2521. But which is the one you  
10 want to focus on?

11 MR. OLSHIN: Well, I'll focus on those first if Your  
12 Honor --

13 THE COURT: Okay.

14 MR. OLSHIN: -- prefers I do that.

15 THE COURT: All right. So --

16 MR. OLSHIN: I think what happens under this policy is  
17 that this is a multi-state policy it's covering Delphi  
18 operations in, if I counted the number of states correctly, at  
19 one point, I think the number's like 32.

20 THE COURT: Right.

21 MR. OLSHIN: So it's not surprising that, in fact,  
22 those other entities would be named because they are picked up  
23 in various states depending upon where those entities operated.

24 THE COURT: But these are Michigan entities.

25 MR. OLSHIN: Some of them are, some of them aren't.

1 THE COURT: So are you saying this only covers their  
2 liabilities if someone who works at the Michigan, let's just  
3 you know pick one, Glen Hill workplace gets injured in  
4 California?

5 MR. OLSHIN: No, that's not what I'm saying.

6 THE COURT: Okay. So --

7 MR. OLSHIN: I thought you were referring to the list  
8 in general, and what I said was, some of them are Michigan and  
9 some of them are not.

10 THE COURT: Right.

11 MR. OLSHIN: And to determine which workplaces are  
12 covered under this endorsement, you look first to the general  
13 section, which indicates that self-insured entities aren't  
14 covered, and you look at the designated workplace exclusion  
15 endorsement, which is ACE policy 2794, it's the last page --

16 THE COURT: Well, we'll get to the exclusion  
17 endorsement --

18 MR. OLSHIN: All right.

19 THE COURT: -- but I want to unpack what you just said  
20 a little bit.

21 How -- from page 1 --

22 MR. OLSHIN: Yes.

23 THE COURT: -- how do you -- what supports the  
24 statement that self-insured entities aren't covered?

25 MR. OLSHIN: I think the general locations section of

1 the general section of the policy.

2 THE COURT: Well, let's just take --

3 MR. OLSHIN: And the designated workplace exclusion  
4 endorsement together.

5 THE COURT: Okay. But leaving aside the exclusion  
6 endorsement on 2475, what on this page shows that self-insured  
7 entities are not covered?

8 MR. OLSHIN: On this particular page, 2475 in and of  
9 itself?

10 THE COURT: Right.

11 MR. OLSHIN: There's nothing other than the fact that  
12 the policy says on the first page, "see schedules and forms and  
13 endorsements" which is about three-quarters of the way --

14 THE COURT: Okay.

15 MR. OLSHIN: -- and item 4 of the policy.

16 THE COURT: All right. So when you -- so again when  
17 you go to the general section, it has the same language that I  
18 quoted earlier: "You, the employer named in item 1 in the  
19 information page."

20 MR. OLSHIN: Right.

21 THE COURT: But here, is there a -- I mean, there are  
22 a lot of information pages.

23 MR. OLSHIN: No doubt, I agree.

24 THE COURT: And many of them list -- well, one of them  
25 lists Delphi Corporation, one of them lists Delphi Automotive

1 Systems, Services, and then some other Delphi entities.

2 MR. OLSHIN: Right.

3 THE COURT: And then there's specific locations listed  
4 in Michigan.

5 MR. OLSHIN: Yes, sir.

6 THE COURT: So unlike 2000 and 2001, is there a  
7 specific Michigan information page?

8 MR. OLSHIN: Yes, sir.

9 THE COURT: And you'd say that's 2647?

10 MR. OLSHIN: Give me one second to find it here.

11 It is 2647, that is correct.

12 THE COURT: Okay. But why would these -- why would  
13 you have these other pages covering Michigan entities and  
14 locations, and then separately have a Michigan information  
15 page?

16 MR. OLSHIN: Well, you would have a separate Michigan  
17 information page to reflect which entities are actually being  
18 rated under this policy.

19 THE COURT: But --

20 MR. OLSHIN: You would have the list. Is there a  
21 better way to prepare the list? Maybe there could've been, but  
22 in this case, the list was the entities which ACE/Pacific had  
23 listed as potential Delphi entities, but you have to look at  
24 the general section of the policy and the designated workplace  
25 exclusion endorsement because to the extent --



1 THE COURT: I know I'm putting you off on the  
2 exclusion endorsement --

3 MR. OLSHIN: Right.

4 THE COURT: -- but so just turning back again to 02519  
5 through 02521, they list a lot of Michigan locations. So what  
6 is the purpose of this list, which is also an extension of  
7 information page?

8 MR. OLSHIN: I think read in context of this policy,  
9 it's reflecting if something turns out not to be self-insured  
10 because it's covered. If it's self-insured, it's not covered.

11 THE COURT: And you get there through the exclusion?

12 MR. OLSHIN: I get there through the exclusion and the  
13 general section of the policy. Because the exclusion says,  
14 "locations covered by the following policies are not covered  
15 under this deductible policy," and in the State of Michigan, as  
16 part of its self-insured approval process, Delphi provided a  
17 list to the Agency and Funds, which specified exactly those  
18 Delphi operations for which it required or requested self-  
19 insurer authority to be approved. And those were the entities  
20 that were approved and locations.

21 THE COURT: And this is 0002498?

22 MR. OLSHIN: 00 -- you mean, the designated workplace  
23 exclusion endorsement, Your Honor?

24 THE COURT: Yes.

25 MR. OLSHIN: 002794.

1 THE COURT: Well, wait a minute.

2 MR. OLSHIN: The first page of which is 002793 which  
3 basically says --

4 THE COURT: I'm sorry, let me get to that. I don't  
5 think I have that in my exhibit book.

6 MR. OLSHIN: You don't?

7 THE COURT: Oh, I'm sorry, I have it.

8 MR. OLSHIN: It should be the very last page at tab  
9 15.

10 THE COURT: 94, okay. Oh, there's two of them here I  
11 guess. There's another one: 002498, designated workplaces  
12 excluding endorsement. Do you see that one, too?

13 UNIDENTIFIED: (Indiscernible)

14 MR. OLSHIN: I'm sorry, what?

15 UNIDENTIFIED: The page right before (indiscernible).

16 THE COURT: Do you see that? It's right after the  
17 general terms.

18 MR. OLSHIN: You're correct, Your Honor, it was  
19 actually in two places. I was looking in the other place.

20 THE COURT: Is it the same thing?

21 MR. OLSHIN: I think it is.

22 THE COURT: Yeah, it looks like it is. So --

23 MR. OLSHIN: Yeah, it is, Your Honor.

24 THE COURT: -- you're representing to me that these --

25 MR. OLSHIN: 2498 and 2794 appear to be the same.

1 THE COURT: So when you -- so this says, "The policy  
2 does not cover work conducted at or from," and then it lists  
3 three policies. Right? Is that what WCU, WCU and SCF means?

4 MR. OLSHIN: Right, there's four, right.

5 THE COURT: Four, excuse me.

6 MR. OLSHIN: And one of them is the retention policy  
7 that was issued for 2008 and 2009.

8 THE COURT: And that's the SCF-1 I guess.

9 MR. OLSHIN: I can tell you in two seconds.

10 It's the 135, Your Honor, the last three digits, the  
11 third one down.

12 THE COURT: So --

13 MR. OLSHIN: Some of these others apply to other  
14 states.

15 THE COURT: So what is the import of listing these  
16 four policies?

17 MR. OLSHIN: It's telling the policy holder and the  
18 reader that if you have self-insured locations, which is what  
19 is covered under a self-insured retention policy, that those  
20 locations are not covered under the deductible policy.

21 THE COURT: But how do you get that from just the  
22 listing of these four policies?

23 MR. OLSHIN: Because you know from those policies that  
24 Delphi Corporation self-insured locations in Michigan are in  
25 fact covered, and that's in the cover page of the self-insured

1 retention policy.

2 THE COURT: I'm sorry, so let's just go -- which is  
3 the one from Michigan of these four?

4 MR. OLSHIN: The third one down, 0135.

5 THE COURT: Okay. So 0135 says what?

6 MR. OLSHIN: It's the self-insured retention policy  
7 for that policy year, which covers Delphi's self-insured  
8 operations for that policy. It's under -- it looks like it's  
9 tab 16, Bates number ACE policy 224. It's entitled "specific  
10 excess worker's compensation --"

11 THE COURT: So this covers, this covers -- tab 16,  
12 that policy covers all of the self-insured locations, it's an  
13 excess policy.

14 MR. OLSHIN: Yes, sir. And you know that under item 3  
15 on page 224, states in which coverages apply, and one of the  
16 states indicated is Michigan.

17 THE COURT: Okay. So --

18 MR. OLSHIN: And an example of what I was talking  
19 about earlier, Your Honor, with respect to the self-insured  
20 application is the one that's under tab 18 --

21 THE COURT: Right.

22 MR. OLSHIN: -- which reflects at Bates number  
23 MIWCAFOIA003774, the list of Michigan operations.

24 THE COURT: So what you're saying is, notwithstanding  
25 the references on page 1 of the policy, 002475, to the -- those

1 named on the extension of information schedules, the reference  
2 to this policy includes these forms -- or these endorsements  
3 and schedules - "see schedules and forms of endorsements" --  
4 that that includes the exclusion?

5 MR. OLSHIN: Correct.

6 THE COURT: Which modifies the general section?

7 MR. OLSHIN: Well, works in combination with I guess  
8 is what I would say.

9 THE COURT: And so the policy doesn't really cover --

10 MR. OLSHIN: Right.

11 THE COURT: -- these locations.

12 MR. OLSHIN: And the similar construct of this 2008  
13 policy works for --

14 THE COURT: 2003, 2005 and 2006.

15 MR. OLSHIN: Yes, sir.

16 THE COURT: Okay. So should we turn to 2007?

17 MR. OLSHIN: Well --

18 THE COURT: I'm not sure there's any difference with  
19 2007 either.

20 MR. OLSHIN: 2007 works the same way.

21 THE COURT: Okay. And 2004?

22 MR. OLSHIN: The difference in 2004 is those Michigan  
23 extension of information pages that we've spent a lot of time  
24 talking about.

25 THE COURT: Right.

1 MR. OLSHIN: As well as any other information page in  
2 that particular policy. For some reason, a computer decided to  
3 insert in every single information page, instead of the actual  
4 name of the entity, it used the word "insured", i-n-s-u-r-e-d.  
5 So if you would look at, and I've provided an example of one  
6 which was Alabama, and I'm looking under tab 37, Your Honor.

7 THE COURT: Right.

8 MR. OLSHIN: It's ACE policy 1191.

9 THE COURT: And what page?

10 MR. OLSHIN: I'm sorry?

11 THE COURT: And what page?

12 MR. OLSHIN: It's ACE policy 001191, it's the --

13 THE COURT: No, I know, but you were going to go to a  
14 specific page in the --

15 MR. OLSHIN: Oh, I apologize. I'm sorry.

16 THE COURT: That's okay.

17 MR. OLSHIN: I've yet -- instead of giving you the  
18 whole policy, I just wanted to make the point that they also  
19 have the same. So if you look for instance at ACE policy  
20 001242, that is the worker's compensation and employer's  
21 liability insurance policy information page for Alabama,  
22 instead of indicating the entity, it just says insured, and  
23 correspondingly if you look over at 1302, again for whatever  
24 reason, the computer just stuck in the word insured for however  
25 many states this policy is covering. I think it's still

1 covering close to 30 some odd states. That's what all the  
2 information pages provide for.

3 THE COURT: But again, I think given that there are  
4 information pages that list Michigan addresses, you're really  
5 relying on the exclusion again, aren't you?

6 MR. OLSHIN: Well, I'm relying on the exclusion, and I  
7 provided Your Honor under tab 38, Aon Delphi's submission,  
8 which shows you, and that's the whole submission is Bates  
9 number 1761 through 1768, this is the worker's compensation  
10 submission. And if you look at within tab 38, Reply Exhibit  
11 38, 1766, you'll find that Delphi and Aon went to a lot of  
12 trouble splitting out its insured obligations from it's self-  
13 insured obligations.

14 THE COURT: But in the policy itself, is there an  
15 exclusion?

16 MR. OLSHIN: In the -- yes, there is an exclusion.

17 THE COURT: And where is that? I'm trying to find it  
18 here.

19 MR. OLSHIN: I've got to find it for you.

20 THE COURT: I thought I went through all these, but I  
21 haven't gone through this one. Oh, I see, it's 001212.

22 MR. OLSHIN: 1212, that's correct.

23 THE COURT: Okay.

24 MR. OLSHIN: It says, "The designated workplace  
25 exclusion endorsement, this policy does not cover work

1 conducted at or from," and then it says, "this policy does not  
2 cover work conducted at or from any workplace covered by the  
3 following policies," and it gives two policy numbers. And the  
4 retention policy for 2004, 2005 is the -- is included in the  
5 reply exhibits.

6 THE COURT: Okay. All right.

7 MR. OLSHIN: So we provided the Aon Delphi submission  
8 to show Your Honor that when you look at the words "insured,"  
9 you can look at under Reply Exhibit 38, ACE 1766, which is part  
10 of that submission, and if you go to Michigan you'll see that  
11 there are two entities, ASEC, spelled A-S-E-C and Mechatronics,  
12 M-e-c-h-a-t-r-o-n-i-c-s, and it provides for the Michigan  
13 operations for ASEC, 877,742, and for Mechatronics, 1,294,164,  
14 and if you look at the Michigan extension of information page,  
15 and the rating you basically can track those numbers.

16 So we think the words "insured" are meant fairly to  
17 represent those two entities.

18 THE COURT: Okay. All right. So what is the Michigan  
19 -- does anyone want to take a break? I was going to ask the  
20 Michigan defendants whether they -- you know, would want to  
21 respond to this, but I'm happy to take a five minute break or  
22 so.

23 MR. HADDAD: Whatever Your Honor's pleasure is,  
24 because I'm going to have a significant amount to say with  
25 respect to each of these points.



1 THE COURT: All right. Why don't we come back --

2 MR. HADDAD: But I'm happy to proceed.

3 THE COURT: -- around noon.

4 (Recessed at 11:55 a.m.; reconvened at 12:06 p.m.)

5 THE CLERK: All rise.

6 THE COURT: Be seated.

7 Okay. We're back on the record in ACE America

8 Insurance Company and Pacific Employers Insurance Company

9 versus Delphi et al.

10 MR. HADDAD: Thank you, Your Honor. I have spoken a  
11 little bit to the legal statutory issues, and I indicated at  
12 that time that there's a combination of the statute and the  
13 contract here which is being presented to Your Honor for  
14 decision. And what have here, Your Honor, is a unique scenario  
15 of the insurance company trying to get out of paying by arguing  
16 that the plain meaning of the words of its own policy should  
17 not be interpreted as written.

18 Now, usually my experience has been with insurance  
19 companies over the years is they try and catch with you with  
20 some kind of hidden cottage deal, or ah, you don't win because  
21 of the such and such endorsement. And they're trying that  
22 here. They're saying you don't win because of one of these  
23 exclusions that we just pointed to.

24 But here, and here is where they lose, as a matter of  
25 law, as a matter of fact, as a matter of contractual

1 interpretation, the reason why they lose and why the Michigan  
2 defendants are entitled to summary judgment is because each  
3 policy contains the Michigan law endorsement.

4 And that Michigan law endorsement is admittedly  
5 unambiguous, is attached to each policy. The only links into  
6 is Section 3A, which is the name of the state to which it  
7 applies. So all the references to Section 4, to item 4, to  
8 premium calculations, to anything else, they don't apply.

9 And what the Michigan law endorsement says, it's got  
10 an override clause, and it's got a nullified clause. And the  
11 override clause says, "notwithstanding any language elsewhere  
12 contained in this contract or policy of insurance, the accident  
13 fund or insurer issuing this policy hereby contracts and  
14 agrees," and then they list the claims -- the coverage, and  
15 they say we're providing compensation, and are providing  
16 medical services, and we're providing rehabilitation services,  
17 and we're providing funeral services. And we're looking at the  
18 conflict provision at the end, the nullified clause, clause H,  
19 and it's attached in every single one of these policies.

20 It says, "Any provision of this contract which is not  
21 in harmony with this paragraph, is to be construed as modified  
22 hereby, and all conditions and limitations in this policy," all  
23 conditions and limitations in this policy, "if any, conflicting  
24 herewith, are hereby made null and void." That's a requirement  
25 of law and it's in every one of their contracts.

1 THE COURT: What about the introductory clause to the  
2 whole thing?

3 MR. HADDAD: Yep.

4 THE COURT: Which says, "This endorsement applies only  
5 to the insurance provided by the policy."

6 MR. HADDAD: Right. Because Michigan is shown in item  
7 3A, the reason why it is, is because Michigan is shown in 3A,  
8 and that's what links it to Michigan, otherwise, the Michigan  
9 law endorsement would not apply, you'd have the Alabama  
10 endorsement, or the Washington endorsement, or some other  
11 endorsement.

12 What we're saying here is, since you have Michigan in  
13 item 3A, then this endorsement applies. The named insured is  
14 Delphi. You are the insured employer, and then it says  
15 "notwithstanding any language elsewhere contained in this  
16 contract." And that's a very important clause. The  
17 "notwithstanding any language elsewhere contained in this  
18 policy," because that language is routinely enforced, and in  
19 our reply brief, in our moving brief, we've cited cases  
20 including from the Michigan Supreme Court which say, when  
21 there's a "notwithstanding" paragraph in your contract, it's  
22 unambiguous. Because even if you have something completely to  
23 the contrary somewhere else in that policy, it is not to be  
24 enforced as a matter of law. And you must, you must enforce  
25 the contract as written in the Michigan law endorsement.

1 Now, at Mr. Schrock's (ph) deposition and one of the  
2 other side submitted the entirety of Mr. Schrock's deposition,  
3 he gave a deposition a couple of weeks ago, they asked him "Do  
4 you have a copy of the policy" because he was saying we were  
5 having all these multiple assureds, he said, no, I don't have  
6 the policy. They said, well then how do you know what's in the  
7 policy. He says, well, and it's at Mr. Schrock's transcript at  
8 page 35 and 36, he said, well, the terms of the policy are  
9 governed by statute and these terms contained in this Michigan  
10 law endorsement are verbatim out of 621 of the statute,  
11 verbatim. And it provides a minimum level of coverage that is  
12 set forth by any insurer that writes a policy in Michigan.

13 When ACE decided, when ACE decided that they were  
14 going to do business in Michigan, they -- when they signed up  
15 to say, I'm going to be a worker's compensation insurer in  
16 Michigan, they agreed to include this clause in every one of  
17 their contracts. In fact, they were compelled to. They were  
18 compelled to by statute, and beyond that, they in fact did.  
19 They in fact did include this clause, this Michigan law  
20 endorsement in each and every one of their contracts.

21 And I was deposing Mr. Groves (ph) of ACE. He hadn't  
22 supplied an affidavit on the motion; I had actually wanted to  
23 depose the person who supplied the affidavit, they said that  
24 person's not available, we'll get you Mr. Groves. I said,  
25 okay, we'll depose Mr. Groves, he's a senior guy at ACE, he

1 knows a lot. And he explained a number of things that are  
2 very, very critical. And we've cited to them in our moving  
3 papers, attach it to my affidavit, and summarized it in our  
4 moving memo of law.

5 He said, well, when we decided to go into Michigan, we  
6 said we intend to comply with Michigan law, page 45, 44, 45.  
7 He said, we included the required Michigan endorsement in every  
8 policy. And I walked him through a policy. And when I walked  
9 Mr. Groves through it at his deposition was the 2008 policy,  
10 and I asked him was the -- how was this policy prepared. And  
11 he said, well, we have an underwriter and an assistant  
12 underwriter, and they prepare instructions, and they give it to  
13 ACE's central operations unit in Wilmington, Delaware and is  
14 prepared by somebody there, and then they have a supervisor,  
15 and a quality control process to ensure that the policies are  
16 prepared in accordance with its intention, pages 30, 31 through  
17 38 of Mr. Groves' deposition.

18 And he said then the policy is reviewed to coincide  
19 with the issuance instructions from the underwriter, then it's  
20 reviewed by the underwriter to make sure it's accurate. And  
21 then it's signed by yet another person who signs the policy,  
22 and then they go ahead and file a Form 400 with the State of  
23 Michigan.

24 Now, Your Honor's not asked to decide what is the  
25 legal effect of the filing of the Form 400 with the State of

1 Michigan. But what is indisputably a fact is that Michigan --  
2 is that ACE, in fact, filed Form 400 with the State of Michigan  
3 saying, we've issued policies to Delphi Corporation or its  
4 predecessor Delphi Automotive Systems Company. And that's in  
5 the record on this motion.

6 So, in fact, all these people prepared this policy and  
7 included this. And Mr. Groves testified, well, our intention  
8 was to comply with Michigan law. And I asked him, well, who's  
9 the named insured. He said, well, it's Delphi, page 50 of Mr.  
10 Groves' testimony. And it has Delphi's federal employer  
11 insurance number. And the schedule of the named insureds  
12 includes Delphi.

13 And, in fact, if they wanted to delete somebody and if  
14 you're looking at the 2008 policy, it's attached -- the  
15 excerpts are attached as Exhibit A to Mr. Elsenheimer's  
16 declaration. Page 2156, name insured Delphi.

17 THE COURT: But it is a named insured.

18 MR. HADDAD: What's that?

19 THE COURT: It is a named insured.

20 MR. HADDAD: It is a named insured, exactly right.

21 THE COURT: But --

22 MR. HADDAD: They're trying to get out of that and  
23 that's what Your Honor --

24 THE COURT: Well, it's a named insured for, they say,  
25 everything that's not excluded.

1 MR. HADDAD: No, but that's not what the policy says.  
2 The policy doesn't say that precisely because, precisely  
3 because the Michigan law endorsement says you only reference 3A  
4 to find out the State of Michigan is implicated. And after  
5 that, it says, you are the insured employer, Delphi  
6 Corporation, and, notwithstanding any language anywhere else in  
7 this contract, we are making the following insurance. And if  
8 there's anything, all provisions of this contract, it's  
9 paragraph H. Paragraph H of the Michigan law endorsement to  
10 nullify clause that says all provisions of this contract which  
11 are not in harmony with this paragraph, all provisions of the  
12 contract which are not in harmony with the Michigan law  
13 endorsement, are to be construed to be modified hereby. And --

14 THE COURT: Well, I guess my question is, why isn't  
15 the Michigan law endorsement in harmony with the insurer's  
16 position here?

17 MR. HADDAD: Because they are saying that you look to  
18 premium calculation or claims or --

19 THE COURT: No, no, leave that aside.

20 MR. HADDAD: -- ratings or exclusions.

21 THE COURT: Leave that aside. They are saying that  
22 the only insurance provided here is to the specific employer  
23 either, under the 2000 and 2001 policies, listed on the  
24 information sheet, or the non-excluded employer.

25 MR. HADDAD: Because the policy says named insured

1 Delphi Corporation, you are the insured employer. And when I  
2 asked Mr. Groves, I said, is this ambiguous, he said no. I  
3 said --

4 THE COURT: He didn't say what it means though. He  
5 just said it's not ambiguous.

6 MR. HADDAD: No, actually he did say what it means,  
7 because I go to that. First -- and then Mr. Olshin interrupted  
8 and said, well, the document speaks for itself, well, I do  
9 agree, I do agree, the document speaks for itself, that's why  
10 you must not consider those other provisions upon which he  
11 relies.

12 But I think asked --

13 THE COURT: No, you're right it does. He says at line  
14 16 that the insured employer is Delphi Corporation.

15 MR. HADDAD: And on page 70 of my deposition of Mr.  
16 Groves, I asked him, does this policy cover worker's  
17 compensation liability for Delphi Corporation. He said yes.

18 And I said, well, it's time for lunch because I think  
19 I'm done. He said yes, and then we gave him that transcript to  
20 sign, and he reviewed that transcript, and he signed it, and he  
21 didn't change that, after they knew what our position was on  
22 this motion, mind you, which I think is very significant. And  
23 now in reply, after having not only so testified, after not  
24 only having reviewed, signed, and returned his transcript  
25 making other corrections, but not correcting this, he says,



1 well, I want to change something on page 66.

2 Well, let's suppose he's allowed to change something  
3 on page 66 -- and I don't believe he is, because as a matter of  
4 law, once you've signed your transcript, that's it, you're  
5 bound to that testimony. He's the officer of ACE Insurance  
6 Company. But he didn't say I want to change paragraphs -- I  
7 don't want to change page 70. He didn't run from his testimony  
8 at page 70, that the policy covers worker's compensation  
9 liability for Delphi Corporation, and the reason for that is it  
10 plain does. It plainly does on the face of the document. And  
11 when you're asked to interpret a contract, when parties present  
12 to the Court the contract for interpretation, you look to  
13 several things.

14 Now, here you look to the law, as well as the contract  
15 itself. And let me tell you why you look to the law first.  
16 Worker's compensation and Mr. Elsenheimer's affidavit talks  
17 about this, our moving papers talk about this, worker's  
18 compensation is a unique kind of insurance. It's not like D&O  
19 insurance, it's not like lawyer's malpractice insurance, it is  
20 insurance the terms of which are dictated by statute. It is  
21 designed to achieve a public policy purpose, it is required for  
22 all employers having three or more employees in the State of  
23 Michigan, and it is a very critical public policy objective of  
24 the State, when they introduced and entered this legislation,  
25 that the law of the State of Michigan was very important, it's

1 designed to protect the employee and designed to protect the  
2 employer, to say these are the benefits to which you are  
3 employed and injured.

4 And in interpreting a contract for worker's  
5 compensation insurance, and we cited to the Moss case versus --  
6 New Amsterdam versus Moss, we cited that case, and they say, in  
7 view of the unique nature of worker's compensation insurance,  
8 we don't look to issues of meetings of the mind, or intent. We  
9 apply the insurance as required by law, as required by law.

10 And, in fact, they said we don't even care about the  
11 premiums. There was a debate in that case in the Moss versus  
12 the New Amsterdam case, there was a debate about well, who paid  
13 the premiums and what premiums were being paid. The Court said  
14 the premiums don't matter, it's a matter between them, between  
15 ACE and Delphi. It's not a matter with respect to the state or  
16 the injured employees, that is not an issue of concern to us.

17 That was a number of years ago. But more recently,  
18 this year, the Michigan Supreme Court again spoke to a type of  
19 insurance, in the Titan case, and we referenced it in our reply  
20 brief.

21 In the Titan case, there was a car insurance, so it's  
22 not worker's compensation, but the State of Michigan had  
23 mandated 20/40 minimum coverage, and the person committed some  
24 kind of misrepresentation of fraud in getting 100/300 policy.  
25 The Court said, well, with respect to that which policy is

1 mandated by the terms of the statute, which affected that  
2 policy, in other words, any car insurance policy that an  
3 insurance company issues in the State of Michigan, it's got to  
4 be 20/40, so you can't get out of that. But as to this other  
5 stuff, you can go have it on terms of fraud or equitable  
6 remedies.

7 Here, each policy, that's why I said the contract is  
8 linked into the law, here our statute says that each policy for  
9 worker's compensation has to provide these very terms. And, in  
10 fact, this policy does, these policies do, each and every one  
11 of these policies do. Each and every one of these policies  
12 says Delphi Corporation or its predecessor Delphi Automotive in  
13 the Michigan law endorsement.

14 There's no qualification, there's no limitation. In  
15 fact, it's got the antithesis of qualification or limitation.  
16 And he said -- Mr. Olshin was arguing and pointing to premiums  
17 and classifications and none of that matters. Because you have  
18 an unambiguous term here, an unambiguous Michigan law  
19 endorsement which prohibits us from looking outside this  
20 endorsement in interpreting it. Prohibits it.

21 They then say and I heard Mr. Olshin argue again this  
22 morning, well, look at this, the broker did some kind of  
23 calculation.

24 THE COURT: No, leave that aside. I just -- again, I  
25 want to come back to what the Michigan law endorsement says.

1 First, it says, "This endorsement applies only to the insurance  
2 provided by the policy, because Michigan is shown in item 3A of  
3 the information page."

4 MR. HADDAD: Right.

5 THE COURT: Now, you contend I guess that "only"  
6 modifies "because."

7 MR. HADDAD: Yeah, because you have a --

8 THE COURT: As opposed to the word right in front of  
9 it which is "the insurance."

10 MR. HADDAD: Well, it provides -- applies only to the  
11 insurance provided by the policy because Michigan -- so you  
12 have this giant policy, Your Honor, it has -- I don't think you  
13 have the policy --

14 THE COURT: Yeah. People have misused this often, but  
15 usually "only" modifies what it's in front of as opposed to  
16 something down the line. But leave that aside --

17 MR. HADDAD: Putting that aside, it can still --

18 THE COURT: -- I can see it be read both ways on that  
19 point.

20 MR. HADDAD: I still come back to, I still come right  
21 back to, you are the insured employer.

22 THE COURT: Right.

23 MR. HADDAD: You are the insured employer, Delphi  
24 Corporation. And now we cannot look beyond the scope --

25 THE COURT: But the question is --

1 MR. HADDAD: -- of this.

2 THE COURT: -- who is "you."

3 MR. HADDAD: You, you right there, you are the insured  
4 employer. Look at the top, named insured, Delphi Corporation.  
5 Mr. Groves testified Delphi Corporation.

6 THE COURT: But the policy doesn't say that. The  
7 policy doesn't say that Delphi Corporation is the insured  
8 employer.

9 MR. HADDAD: Right. The policy certainly lists -- I  
10 don't know how you can get around named insured --

11 THE COURT: It says it is an insured employer for  
12 certain specific locations.

13 MR. HADDAD: Well, I don't know why they listed every  
14 one of the Delphi --

15 THE COURT: Well, if you take your exclusion, if you  
16 accept the exclusion.

17 MR. HADDAD: I mean that's kind of silly to say let's  
18 take inclusions and exclusions.

19 THE COURT: All right. But --

20 MR. HADDAD: Given the unambiguous language of this  
21 document --

22 THE COURT: Well --

23 MR. HADDAD: -- which is how they've acknowledged it  
24 to be. I mean, that's the testimony, and I think that's what  
25 it is on its face.

1 THE COURT: The language says that, and the statutory  
2 language is what's under the headings --

3 MR. HADDAD: Notwithstanding.

4 THE COURT: -- that "it will pay to the persons that  
5 may become entitled thereto all workman's compensation for  
6 which the insured employer may become liable under the  
7 provisions of --"

8 MR. HADDAD: It's a little more than that actually.

9 THE COURT: "Under the Michigan's Workman's  
10 Compensation Act for all compensable injuries or compensable  
11 occupation diseases happening to its employees during the life  
12 of this contract policy." And then it has several other  
13 paragraphs also referring to the "insured employer."

14 So I think the issue for me is, does this endorsement  
15 cause -- I'm not asking you to accept that ACE's interpretation  
16 is correct, that the insured employer for purposes of these  
17 policies is limited by either the exclusionary provision or the  
18 -- for 2000, 2001, the information page. But let's assume for  
19 the moment that the insured employer under the policies is  
20 limited by those terms.

21 You're arguing to me that this provision, this  
22 endorsement, in essence then, modifies the policy?

23 MR. HADDAD: I'm saying it is the policy.

24 THE COURT: It is the policy? Okay.

25 MR. HADDAD: By their interpretation --

1 THE COURT: And you're saying the reason for that is  
2 that it's required by Michigan law.

3 MR. HADDAD: It is required by Michigan law, and it  
4 says, "you." So the question doesn't say some other entity  
5 that may be covered within the scope of some other policy, it  
6 says "you." There's no ambiguity in the word "you."

7 THE COURT: Well --

8 MR. HADDAD: You is the only name that --

9 THE COURT: -- I think there is. I clearly think that  
10 you could easily say, in fact, and this is consistent with the  
11 policy that this applies to "you," "whoever you are, as the  
12 insured employer." Because that's what the policy provides  
13 for. "You are the insured employer."

14 MR. HADDAD: The only name appearing on this document  
15 is Delphi Corporation and the only witness that they --

16 THE COURT: But we are the -- you -- no --

17 MR. HADDAD: -- set forward to testify about this said  
18 it was Delphi Corporation.

19 THE COURT: But we are the insurer issuing this  
20 policy. The policy only applies, again, accepting the  
21 hypothetical, the policy only applies to, as far as the  
22 Michigan locations are concerned, the ones enumerated. So  
23 that's -- we -- it only applies to us, and we are the only  
24 insurer under that policy, not for the whole policy.

25 MR. HADDAD: Your hypothetical with respect is not the

1 fact.

2 THE COURT: Let me give you an example. Let's just  
3 say that, for example, this policy said that Delphi Corporation  
4 is the insured and very clearly covered only one location in  
5 Michigan, you know, the clerical office space in Lansing. And  
6 then went on to say it applies to Alabama and Arkansas and  
7 Alaska and every other state in the union.

8 Would all of Delphi's locations really be -- would  
9 they really be the insured in issuing this policy?

10 MR. HADDAD: Yes. Because if you look at --

11 THE COURT: So the Michigan statute is -- where ACE  
12 insures workers in Alabama, the Michigan statute's purpose is  
13 to incorporate it into Michigan for all workers?

14 MR. HADDAD: I thought you said Lansing. I'm sorry.  
15 And other -- then I misunderstood Your Honor.

16 THE COURT: No, there's one location --

17 MR. HADDAD: I thought you said that it was clericals  
18 -- I misunderstood the context.

19 THE COURT: It's having a blanket policy --

20 MR. HADDAD: Yep.

21 THE COURT: -- and except for one location in Lansing,  
22 Michigan, which is specifically named, and it excludes all  
23 other locations in Michigan, but it issues a blanket policy  
24 which includes the other 49 states in the country, you're  
25 saying that because it issued worker's comp insurance for



1 Alaska, even though the policy doesn't cover anything in  
2 Michigan other than Lansing, that the fact that it issued that  
3 insurance means that it is, in fact, the insurer under this  
4 policy, and therefore, it has to provide worker's comp for  
5 every location?

6 MR. HADDAD: In the State of Michigan?

7 THE COURT: Yes.

8 MR. HADDAD: Not Alaska, and I'll tell you why, I'll  
9 tell you that it's because of E, scope of contract. This  
10 insurance contract shall for all purposes be held and deemed to  
11 cover all the businesses of said -- that the said employer is  
12 engaged in at the time of the issuance of this contract, and  
13 all other policies that it may engage in during the lifetime.

14 THE COURT: All right. So let me -- I agree with --

15 MR. HADDAD: So it's actually yes.

16 THE COURT: So I agree with you on that point. But  
17 let's vary it now.

18 MR. HADDAD: Okay.

19 THE COURT: Let's say that it issues a policy that  
20 covers Delphi everywhere in the country except Michigan, and it  
21 covers Packard Hughes in Michigan. So has it issued insurance  
22 for Delphi in Michigan?

23 MR. HADDAD: I would say the answer is -- given that  
24 hypothetical -- what does it say is who the named insured is on  
25 the Michigan law endorsement? Because if it says Delphi, then

1 I think the answer is yes.

2 THE COURT: Well, you're saying that the endorsement  
3 covers and not the policy?

4 MR. HADDAD: I'm saying that the endorsement covered  
5 -- that the endorsement is essentially the policy --

6 THE COURT: Even though there's a perfectly good  
7 explanation of why it was "the insured," which is that it was  
8 the insured in Alabama and Arkansas and Alaska?

9 MR. HADDAD: Well then they wouldn't have listed all  
10 of those separate addresses, and they wouldn't have provided  
11 this document and said, the named insured is Delphi  
12 Corporation. They didn't say Packard Hughes.

13 THE COURT: But it's --

14 MR. HADDAD: It's not what they said, Your Honor, and  
15 they filed a Form 400 with the State of Michigan saying we  
16 insure Delphi Corporation, to announce to the whole word that  
17 that's who's insured. And you can't --

18 THE COURT: But that's -- but you can make that  
19 argument elsewhere.

20 MR. HADDAD: Well, as a matter of evidence, I think  
21 it's an evidence of fact.

22 THE COURT: As a matter of evidence --

23 MR. HADDAD: I'm not asking you, for you to interpret  
24 that because as a matter of law it's a fact.

25 THE COURT: But I'm just trying -- I'm trying to

1 interpret the endorsement, and it's an endorsement to a  
2 specific policy, if the policy doesn't cover the employer, I  
3 don't see how it can be an endorsement to the policy.

4 MR. HADDAD: Because the policy as they are now trying  
5 to argue is that there is a clause or an exclusion or something  
6 else that is inconsistent with the endorsement.

7 THE COURT: But why is it inconsistent if the  
8 endorsement covers a specific policy? You're -- it seems to me  
9 you're putting all the weight on "the named insured," right?

10 MR. HADDAD: I'm putting all the weight on the named  
11 insured and who's the insured employer, which it says "you,"  
12 and you can only mean Delphi, because that's the only people --  
13 that's the only company that's discussed and it doesn't --

14 THE COURT: But it's attached --

15 MR. HADDAD: And it doesn't tie --

16 THE COURT: But it's attached --

17 MR. HADDAD: It's attached to a very large policy.

18 THE COURT: Which refers to other entities.

19 MR. HADDAD: It does, it refers to it, but the reason  
20 -- the only thing that we're talking about here is --

21 THE COURT: So are the other entities not covered by  
22 this? Wouldn't the other entities have to be listed here too  
23 under your logic?

24 MR. HADDAD: I don't know.

25 THE COURT: Well, they would, obviously, because "you"

1 doesn't refer to them under your logic.

2 MR. HADDAD: I mean --

3 THE COURT: The only logical place it refers to is the  
4 entities covered by the policy.

5 MR. HADDAD: Okay. But the entities covered by the  
6 policy is modified and clarified unambiguously we submit by  
7 this endorsement, because it says anything -- any provision of  
8 this contract, and any conditional limitation that conflicts  
9 here is made null and void. So the limitation that they're  
10 asking for --

11 THE COURT: Well, that assumes there's a conflict,  
12 though. Why would there be a conflict?

13 MR. HADDAD: Because --

14 THE COURT: If "you" refers to the policy -- the  
15 person covered by the policy, the employer covered by the  
16 policy, there's no conflict at all. Because Hughes -- Packard  
17 Hughes, this policy does, in fact, cover all of Packard Hughes'  
18 employees, as is the purpose of the statute. So you're not  
19 splitting it up.

20 MR. HADDAD: This document --

21 THE COURT: And this isn't, you know, in contrast to  
22 the case you cited, this isn't a case where either there's no  
23 insurance (because they're self-insured) or, alternatively,  
24 someone splitting up the insurance, because that's not  
25 happening, either. So the purpose of the endorsement is under

1 the ACE interpretation, is completely consistent with their  
2 analysis.

3 MR. HADDAD: The purpose -- the ACE interpretation I  
4 submit, Your Honor, is completely inconsistent not only with  
5 the document and with their own witnesses and testimony --

6 THE COURT: Well, what is the --

7 MR. HADDAD: -- and with their own conduct in issuing  
8 the Form 400 and with --

9 THE COURT: But what is the purpose --

10 MR. HADDAD: -- issuing this policy.

11 THE COURT: What is the purpose of the endorsement?  
12 What is the purpose of the statute?

13 MR. HADDAD: To avoid this very dispute, Your Honor.

14 THE COURT: Why -- no, why is -- isn't --

15 MR. HADDAD: It's to make it --

16 THE COURT: Isn't the fact that you're supposed to  
17 cover everything, isn't that the purpose of the statute that  
18 you're supposed to insure all of the employees of the covered  
19 employer?

20 MR. HADDAD: Yes.

21 THE COURT: All right. And so --

22 MR. HADDAD: And when you say that you're covered --  
23 and to be clear as to who's your covered employer, you look to  
24 your Michigan law endorsement. We don't even get the policy.  
25 I mean, let's move back a bit.

1 THE COURT: Where does it say that?

2 MR. HADDAD: Mr. Schrock so testified and that is  
3 undisputed.

4 THE COURT: That's an issue of law, that's not a -- I  
5 mean --

6 MR. HADDAD: I mean, it's a fact that we don't get the  
7 policy and it's -- it is an undisputed fact that we don't get  
8 the policy. They comment about from Mr. Grudy's (ph) reply  
9 declaration says that the form was approved, well, sure the  
10 form's approved. So long as you've got your endorsement the  
11 form's approved. We don't care about exclusions because the  
12 exclusions don't apply. Exclusions don't apply to worker's  
13 compensation in Michigan. You sign up, you issue the policy --

14 THE COURT: Exclusions don't apply if you're excluding  
15 out part of the employees. But if you're going company-by-  
16 company, there's nothing that says they don't apply. I mean,  
17 we went through that. You can insure one subsidiary and not  
18 another.

19 MR. HADDAD: Right, and what they --

20 THE COURT: And that's all the exclusion does, right?

21 MR. HADDAD: Well, what they chose to do here, and I  
22 know I keep coming back to the same place, and the reason why I  
23 keep coming back to the same place, is that it's essentially  
24 the be all and the end all of the analysis is you are the  
25 insured employer, they listed it as Delphi Corporation, their

1 witness so testified, it's unambiguous. Anything to the  
2 contrary cannot be used to interpret this policy either as a  
3 matter of fact, as a matter of law, or as a matter of  
4 contractual construction. You can't look to this parole  
5 evidence. You can't look there because it's excluded by law.  
6 Okay.

7 THE COURT: I'm not looking to --

8 MR. HADDAD: And I think --

9 THE COURT: I think frankly if I were to look at the  
10 parole evidence there would be a whole different story, I'm  
11 just looking at the agreements.

12 MR. HADDAD: And the agreements has the override  
13 clause: "notwithstanding any language elsewhere contained in  
14 this contract of policy of insurance."

15 THE COURT: Okay. Well, is there any --

16 MR. HADDAD: We insure through the insurer.

17 THE COURT: -- other basis for objecting or stating  
18 that the plaintiff's construction of the policies is incorrect?

19 MR. HADDAD: Other than the words of the policy  
20 itself?

21 THE COURT: Well, under the --

22 MR. HADDAD: Under the --

23 THE COURT: Other than the endorsement.

24 MR. HADDAD: The endorsement, the testimony is --

25 THE COURT: But is there anything beyond the

1 endorsement?

2 MR. HADDAD: It's the case law that I've -- that we've  
3 cited in our briefs including the New Amsterdam versus Moss  
4 case.

5 THE COURT: But again, Moss was a case where there  
6 wasn't going to be insurance, right? Here the -- there is  
7 insurance, it's just that Delphi's bankrupt or insolvent. But  
8 the statute sets up the Agency, SIP to pay --

9 MR. HADDAD: Well, no, but --

10 THE COURT: SIF to pay if it's insolvent. So it's  
11 not --

12 MR. HADDAD: No, actually what the statutes does is if  
13 the insured -- the self-insured does not pay, and in 2009 after  
14 saying for years that they were going to pay it, and in fact,  
15 after continuing to pay, which is perhaps why, as Your Honor  
16 suggested, there was no large premium there for all those  
17 years, either before or during the bankruptcy, what the self-  
18 insurance fund does is they look, and this is undisputed, both  
19 in Mr. Elsenheimer's affidavit and also Mr. Schrock's  
20 testimony, is you look primarily to the self-insured during the  
21 period of time that they are an approved self-insurer, and so  
22 long as they are carrying out their function, we're fine with  
23 that.

24 Here -- and once they stop, you look to see who else  
25 is on the risk for this and you --



1 THE COURT: I understand that but --

2 MR. HADDAD: -- come to a Delphi -- to ACE, and they  
3 filed these forms for the agency, they issued these policies,  
4 and --

5 THE COURT: I'm just addressing the following point.  
6 The Michigan statute does not -- let's put it this way. The  
7 Michigan statute is complied with if an employer is approved as  
8 a self-insurer notwithstanding that it is later insolvent or  
9 bankrupt. So they have complied with that statute that far,  
10 right?

11 MR. HADDAD: Up through a point in 2009 when the self-  
12 insurance was revoked by the director --

13 THE COURT: Right.

14 MR. HADDAD: -- at which point the insurer comes up --

15 THE COURT: But to me that's --

16 MR. HADDAD: -- because they have to have --

17 THE COURT: So -- but leave that aside. But to me  
18 that distinguishes Moss.

19 MR. HADDAD: No, because --

20 THE COURT: Because there's insurance. It didn't pay  
21 because it was insolvent, but the statute recognizes that. Now  
22 I understand that if there is additional insurance, obviously  
23 the state has the right to enforce that insurance, no question.  
24 But the issue is whether there is additional insurance.

25 MR. HADDAD: And under 621.4, each policy of insurance

1 covering worker's compensation in this state shall contain the  
2 following provisions. The very first thing it says is  
3 notwithstanding any language elsewhere contained in this  
4 contract or policy, the insurer issuing this policy, hereby  
5 contracts and agrees with the insured employer, and that  
6 insured employer is set forth right here in this document on  
7 the Michigan law endorsement as being Delphi --

8 THE COURT: But --

9 MR. HADDAD: -- and as Mr. Groves so testified it's  
10 Delphi, and we cannot disregard that testimony.

11 THE COURT: But the policy doesn't go to anyone other  
12 than the --

13 MR. HADDAD: Well, that's what they chose --

14 THE COURT: -- who it's issued to.

15 MR. HADDAD: Well, that's how they chose to do it and  
16 that's one of the questions Your Honor had earlier with respect  
17 to well, what does this mean for the bankruptcy case. And, you  
18 know, whatever that means as between ACE and Delphi --

19 THE COURT: But again, it says the insurer issuing the  
20 policy hereby contracts and agrees with the "insured employer."

21 MR. HADDAD: Right.

22 THE COURT: So if you're not insured, again, if you  
23 are not Packard Hughes, but you're Delphi, then you don't fit  
24 within 4.

25 MR. HADDAD: But that's not what the policy says.

1 THE COURT: Well --

2 MR. HADDAD: On this endorsement or under the Form 400  
3 or the testimony of the witness. I mean, I don't see how we  
4 can interpret a policy to ignore --

5 THE COURT: Well --

6 MR. HADDAD: -- each of those fundamental evidentiary  
7 points here --

8 THE COURT: All right.

9 MR. HADDAD: -- on a motion for summary judgment.

10 THE COURT: On --

11 MR. HADDAD: The only way you can interpret it is our  
12 way.

13 THE COURT: Well you certainly -- not only can you,  
14 you must if the plain language of the policy is clear.

15 MR. HADDAD: Well, I think it says "Delphi."

16 THE COURT: Because the testimony wouldn't come in,  
17 and the Form 400 wouldn't come in as evidence. It might be a  
18 separate basis for a liability, but that's not in front of me,  
19 but it wouldn't come in as evidence. So again, I think I'm  
20 just coming back to the meaning of this endorsement. And since  
21 it's tied into and required by a statute, which says the  
22 insurer issuing this policy hereby contracts and agrees with  
23 the insured employer, you know, if the policy doesn't make sure  
24 the particular employer, I don't see how the insurer could be  
25 issuing the policy or someone else could be viewed to be

1 covered by this provision. It doesn't fit.

2 It would basically create a new obligation. Now, I  
3 understand your point that because they've listed Delphi as the  
4 named insured, they may be doing that in this provision.

5 MR. HADDAD: They've done that not only -- I mean, not  
6 just in this provision, but with the exception of the first  
7 year or so --

8 THE COURT: Well, no, I understand.

9 MR. HADDAD: -- every other year, they listed them in  
10 the schedule of additional named insureds, they listed Delphi  
11 Corporation, and then they listed all those locations. So  
12 that's --

13 THE COURT: Well, but I'm asking is there anything  
14 else in the policy besides the endorsement --

15 MR. HADDAD: Well --

16 THE COURT: -- that shows or that contradicts the  
17 plaintiff's argument that, in fact, everything other than what  
18 is covered by the -- I'm sorry, put it -- everything that it  
19 excludes the locations covered by the access policy, the  
20 retention policy.

21 MR. HADDAD: Well, then went ahead and listed all  
22 those other locations of Delphi Corporation --

23 THE COURT: But they have an exclusion. They have an  
24 exclusion provision.

25 MR. HADDAD: And that's why you come back to, Your

1 Honor, we keep coming back to the endorsement which says, don't  
2 look to those, don't look to those, because you're creating the  
3 very ambiguity that the statute and the policy and the public  
4 policy of the state is designed to prevent.

5 THE COURT: But the statute doesn't -- I don't -- the  
6 statute doesn't -- to me the policy of the statute doesn't --  
7 isn't, offended by this. It would be offended in my first  
8 hypothetical, where they go by location, but it isn't offended  
9 if you go by entity. Because the purpose of the statute is not  
10 to split up entities. I'm sorry, not to split up locations.  
11 Split up entities by location, as opposed to go by entity-by-  
12 entity.

13 MR. HADDAD: Well, this entity says -- I mean, I don't  
14 know how many times you want me to say it, Your Honor, it says  
15 Delphi Corporation plain as day, that's what their witness --

16 THE COURT: But it is -- that is the --

17 MR. HADDAD: -- has so testified.

18 THE COURT: -- insured. I mean, the policy was  
19 obtained by Delphi Corporation.

20 MR. HADDAD: Yeah, and it says you're the named -- you  
21 are the insured employer --

22 THE COURT: Well, it doesn't say that.

23 MR. HADDAD: Well, it says -- well, it says you are  
24 the insured employer.

25 THE COURT: But that's doesn't explain who -- you're

1 supposed to know who "you" are. "You" are the one who's  
2 insured.

3 MR. HADDAD: Well, you know, we don't get the  
4 policies. What we get is the Form 400, so from what the public  
5 records reflect is, it's Delphi Corporation. And for year  
6 after year after year for policy after policy after policy,  
7 that's what ACE decided to file with the State of Michigan as a  
8 matter of evidence --

9 THE COURT: Well --

10 MR. HADDAD: -- to the extent that you believe that  
11 perhaps they didn't mean that, then what explanation is there  
12 for why they did that. There's no affidavit from any person  
13 from ACE explaining how this policy was prepared, who's --

14 THE COURT: But again --

15 MR. HADDAD: -- the insured employer.

16 THE COURT: -- that's if the plain meaning doesn't  
17 apply here.

18 MR. HADDAD: You couldn't -- I mean on this -- in  
19 looking at these two pages, the plain meaning -- there's no  
20 other meaning, frankly, Your Honor, that that could reach.

21 THE COURT: Of course there is. Of course there is.

22 MR. HADDAD: From looking at these two pages --

23 THE COURT: Of course there is. We know that there  
24 are other entities who are employers who are insured here.  
25 They didn't list them.

1 MR. HADDAD: We're only talking about this one  
2 particular one, Delphi, and you know, we didn't take discovery  
3 on --

4 THE COURT: Well, that means then you're saying that  
5 the others aren't insured?

6 MR. HADDAD: No, we haven't got -- I haven't looked  
7 into that. I don't know if there's been a claim at issue or an  
8 adversary proceeding brought by ACE to fight that, I have no  
9 idea.

10 THE COURT: Well, just -- look, to me, you should know  
11 who "you" are; you're the one who's insured.

12 MR. HADDAD: Well, I think that --

13 THE COURT: It's in this policy, which refers to 3A,  
14 which says who you're insuring, who's insured, which is the  
15 ones who are listed.

16 MR. HADDAD: No, now let's -- hold -- no. 3A just  
17 says Michigan.

18 THE COURT: Right.

19 MR. HADDAD: Full stop. It doesn't go anywhere beyond  
20 that. I think this is a very important point because --

21 THE COURT: Well, as -- for 2000 and 2001 it does list  
22 them.

23 MR. HADDAD: It does.

24 THE COURT: You're right. But for the other ones, you  
25 have to go to the exclusion.

1 MR. HADDAD: And you shouldn't go to the exclusions,  
2 because the only thing that the endorsement says is you look to  
3 3A, you don't look to 4, you don't look to exclusions, you  
4 don't look to other endorsements, you don't look to premiums,  
5 and you don't look to classifications, and you don't look to --  
6 you don't look to any of that. You don't look to any of that  
7 under this endorsement under the Michigan law, because you  
8 can't have a situation where the employer -- where the insurer  
9 is saying, you know, that policy we issued said Delphi  
10 Corporation and filed that Form 400, just kidding, you can't  
11 have that situation, Your Honor.

12 THE COURT: Why?

13 MR. HADDAD: Why?

14 THE COURT: Yeah, as a matter of --

15 MR. HADDAD: Because that would wreck havoc upon -- I  
16 was thinking --

17 THE COURT: No, no, separate and apart from the Form  
18 400 argument.

19 MR. HADDAD: All right. That's a pretty big argument  
20 as a matter of evidence.

21 THE COURT: No, no, no, I'm just -- I'm focusing on  
22 the plain meaning at this point. The purpose of the Michigan  
23 law endorsement again is not based on 621, is not to, again,  
24 act as a black hole to pull an insurer in wherever one entity  
25 in Michigan is insured.



1 MR. HADDAD: And the insurer can --

2 THE COURT: That's not the -- the reason is, again,  
3 not to split up insurance within an insured entity.

4 MR. HADDAD: The insurer can issue a policy to  
5 subsidiary A and ignore the parent company if they so choose.

6 THE COURT: Right.

7 MR. HADDAD: They chose not to. You know why? I  
8 don't know why, but when I'm looking at this policy --

9 THE COURT: But how did they choose not to? Other  
10 than --

11 MR. HADDAD: I'm looking at this policy and I say,  
12 wow, look at this, this covers worker's compensation insurance  
13 and employer liability insurance and all other state's  
14 insurance, and it lists all kinds of states, and all kinds of  
15 different things. It has lots of stuff in it. I mean, it's  
16 hundreds of pages, it has lots of different provisions in it.

17 THE COURT: Right.

18 MR. HADDAD: One of the things that they decided is  
19 well, we're going to do worker's compensation in Michigan. And  
20 if they want to issue this policy, and in 3A, 2008, and the  
21 earlier years, they just say Michigan. Okay. Well, if they  
22 want to play in that arena, if they want to issue those  
23 policies in the State of Michigan, then they have to comply  
24 with that statute, and they have to provide this level of  
25 insurance because every employer, every employee needs to know

1 that --

2 THE COURT: But why haven't they complied with the  
3 statute?

4 MR. HADDAD: I think they have complied with it, they  
5 just don't want to pay.

6 THE COURT: No, no, let's assume that they're correct  
7 in their argument that they only insured the specific entities  
8 that were not self-insured. Why didn't that comply with the  
9 statute?

10 MR. HADDAD: Well, it's Delphi's job to comply with  
11 the statute.

12 THE COURT: Right.

13 MR. HADDAD: It's ACE's job to issue a policy that  
14 conforms with that statute and is enforceable in accordance  
15 thereof.

16 THE COURT: Well, why didn't Delphi comply with the  
17 statute?

18 MR. HADDAD: I don't think we're saying --

19 THE COURT: They did, didn't they?

20 MR. HADDAD: I don't think we're saying Delphi didn't  
21 comply with the statute --

22 THE COURT: But why didn't the insurance comply?

23 MR. HADDAD: -- until they stopped paying.

24 THE COURT: Yeah. But why didn't the insurers comply  
25 with it?

1 MR. HADDAD: When they said they're not paying, that's  
2 the point. Up till then they filed their Form 400 --

3 THE COURT: No --

4 MR. HADDAD: -- they run the risk and as long as  
5 someone's paying.

6 THE COURT: Okay. But they don't have to be on the  
7 risk to comply with the statute. They can exclude themselves  
8 from the risk and still be complying with the statute.

9 MR. HADDAD: But they chose not to by doing precisely  
10 what they did here, by issuing this policy with this  
11 endorsement by filing that Form 400, year after year after  
12 year.

13 THE COURT: Well, again, the Form 400 is not part of  
14 this --

15 MR. HADDAD: I think it's --

16 THE COURT: -- as part of a plain meaning analysis.  
17 If I get into parole evidence, it will be, but it's not part of  
18 plain meaning analysis. So again, it seems to be you're  
19 putting the cart before the horse by saying they haven't  
20 complied when --

21 MR. HADDAD: No, I didn't say -- you asked me what are  
22 they doing to not comply, not paying. The issuance of the  
23 policy that includes this endorsement, in fact, does comply.  
24 That is compliance with the statute, by issuing this  
25 endorsement with these words on it, and with those terms, that

1 complies with the statute, and now they've just to go to do  
2 what they've committed to do. They just have to actually do  
3 this. They have to agree with the -- they have to agree and  
4 make those payments, provide those cases, provide the medical  
5 services and the rehab and the compensation, and you know,  
6 those unfortunate situations, the funeral services. That's  
7 what they're required to do after having signed up for  
8 insurance in the State of Michigan. That's what they have to  
9 do.

10 THE COURT: Okay. Anything else?

11 MR. HADDAD: I mean, we have another points that we  
12 made in our papers --

13 THE COURT: Well, let's assume we're not on the -- I  
14 mean, I understand that there are issues with respect to the  
15 reformation argument in the summary judgment context, but I'm  
16 really not focusing on anything beyond plain meaning at this  
17 point.

18 MR. HADDAD: Well, the plain meaning, you know, going  
19 back to E, it says "the scope of the contract is all the  
20 businesses that the said employer is engaged in at the time of  
21 the issuance of this contract."

22 THE COURT: Right.

23 MR. HADDAD: All the businesses.

24 THE COURT: Right, but it's the "employer."

25 MR. HADDAD: Well, if you're going to allow them to

1 nine years later, see that policy, just kidding, that's not who  
2 we meant, that's not who we meant in employees of Delphi,  
3 that's not who we meant, State of Michigan. We can't allow  
4 that to happen.

5 I was thinking of different types of analogies as  
6 driving over this morning, it's like the recording act with the  
7 mortgages, it doesn't matter that you had some other thought in  
8 your mind, if you don't file that mortgage, you don't get the  
9 coverage. It's like a letter of credit, it doesn't matter  
10 what's going on in the third side, you have to -- between the  
11 third party. You have to comply with the strict terms of the  
12 document, you have to comply with the strict terms of the  
13 statute, and an insurance company that issues this endorsement  
14 year after year after year, has to be held to comply with it,  
15 because it says right there, plain as day, Delphi Corporation.  
16 And that's what their witness says it means. And for them to  
17 ask for summary judgment on the --

18 THE COURT: But they're --

19 MR. HADDAD: -- basis that their own witness says  
20 that's not what that means, well, that is -- I don't see that.

21 THE COURT: They're only not complying with it if in  
22 fact they're the employer.

23 MR. HADDAD: If, in fact, the named insured is --

24 THE COURT: Delphi is the employer.

25 MR. HADDAD: If, in fact, they would come up with a

1 new interpretation of the document to say that Delphi  
2 Corporation doesn't (indiscernible) corporation, it meant some  
3 other subsidiary of Delphi Corporation whose name you cannot  
4 divine from looking at these two pages.

5 THE COURT: Okay.

6 MR. HADDAD: And I don't think that that's a basis,  
7 and quite frankly it's the opposite. I think that under the  
8 basis of what we have here, the Michigan defendants are  
9 entitled to summary judgment.

10 THE COURT: Okay.

11 MR. HADDAD: And we have put forth, as I said a number  
12 of other arguments in our papers, so I think we're --

13 THE COURT: I mean, besides the arguments that go  
14 after a plain reading argument, I think the only one you raised  
15 is the standing point or more appropriately the necessary party  
16 point. But isn't -- I mean, isn't it right that the interest  
17 of the injured employees, the employees entitled to worker's  
18 comp is completely represented here by the Michigan defendants?

19 MR. HADDAD: No. I mean, I certainly think that Ms.  
20 Cyganowski and myself, Mr. Raterink and my colleagues have  
21 adequately explained why summary judgment should be granted in  
22 favor of our clients, but I think that when you look at the  
23 statute, 418.651, each employee is entitled, in his or her own  
24 name, to enforce their rights directly against the insurance --

25 THE COURT: I understand they have --

1 MR. HADDAD: So that is a --

2 THE COURT: -- the direct right, but the -- they're  
3 going to get paid one way or the other, right, so they have  
4 less of an incentive than the Michigan defendants do. The  
5 Michigan defendants are the one that really want to win there,  
6 because it's their money if it wasn't the insurers' money. But  
7 one way or another, the worker's comp claim is going to get  
8 paid.

9 MR. HADDAD: I'm not sure.

10 THE COURT: Well, what, because the State of Michigan  
11 is insolvent? I mean, it seems that they've been --

12 MR. HADDAD: You know, if they want to -- if the goal  
13 here is to increase the taxes on every employer in the State of  
14 Michigan, I don't know. But it seems to me that when you have  
15 a statute that provides a party with a right, you can't take  
16 away that's party's rights without noticing here, Your Honor.

17 THE COURT: Well, the case law says just the opposite.  
18 For purposes of the necessary party rule, if the Michigan  
19 defendants are adequately representing the interests of those  
20 parties, then they don't have to be joined.

21 MR. HADDAD: I -- you know, I think you have to defer  
22 to the individuals to see how they felt about that.

23 THE COURT: All right.

24 MR. HADDAD: But from our perspective, I mean, I think  
25 we have demonstrated to this Court and to Your Honor why the

1 summary judgment can and should be granted in favor of the  
2 Michigan defendants, compelling ACE to live up to the terms of  
3 its own policy it puts in the endorsement. I mean, from that  
4 perspective, I think that Your Honor can issue summary judgment  
5 in favor of the Michigan defendants. I don't see it working  
6 the other way. I don't see it working the other way when their  
7 own witness contradicted the very position that they're seeking  
8 to take on this motion. When they say something is clear, when  
9 their own witness testified to the contrary, and the document  
10 doesn't say that either.

11 And he said the policy covers -- page 70, this policy  
12 covers worker's compensation liability for Delphi Corporation.  
13 That's the witness' testimony, and they're bound by the  
14 testimony of their own witness. You can't avoid that, Your  
15 Honor. You can't avoid that.

16 THE COURT: On an issue of law?

17 MR. HADDAD: It doesn't matter what its issue is.  
18 It's an issue of what does this policy insure, that's the issue  
19 that's presented to this Court, and their witness said Delphi  
20 Corporation. The question wasn't objected to, it wasn't  
21 corrected at the time, thereafter in his errata sheet or any  
22 other time. And I don't see how we can disregard that  
23 testimony.

24 THE COURT: Okay.

25 MR. HEUER: Your Honor, I'm happy to address the Court



1 if you have any questions for us. But our interests are  
2 adequately represented. We've said that.

3 THE COURT: All right.

4 MR. HEUER: William Heuer, Duane Morris.

5 THE COURT: Okay. Well, why don't we -- I'm -- I'd  
6 like to hear from plaintiffs and maybe Delphi on the issue of  
7 endorsement, but first on the Grove deposition, the Groves  
8 deposition.

9 Are the plaintiffs bound by Mr. Groves' testimony that  
10 the insured employer is Delphi Corporation?

11 MR. OLSHIN: I think Mr. Heuer will address that  
12 issue, Your Honor.

13 MR. HEUER: William Heuer, Duane Morris. Your Honor,  
14 first, the case law is clear that where an opponent goes back,  
15 an affiant goes back and amplifies or explains their testimony,  
16 that's entirely acceptable.

17 When we look at the deposition transcript, it's  
18 important to read what was asked, and what was said, not only  
19 at the two points in time referenced by counsel, but also when  
20 the questioning was brought on by my colleague, Ms. Welsh (ph).  
21 Because at first, the question goes to exactly what you've been  
22 talking about for the last few minutes, what name is on top of  
23 that endorsement. Delphi Corporation is on top of it.

24 The follow-up question, there's another follow-up that  
25 reads off the page, it says, points to the page and says, what

1 does it say there. Fine. Go back to page 86 of the  
2 deposition, because that's where the question is specific, and  
3 it's relevant. The question talks about which entities are  
4 shown as being insured in the State of Michigan. It's not a  
5 broad question of who's the named insured, he's not pointing to  
6 Delphi Corporation as being on the top of the page, and asking  
7 about the insured (indiscernible), it's very specific. Which  
8 are the insured entities in Michigan? And the answer there was  
9 specific, Delphi Diesel, Mechatronics and PHI.

10 Now, the affiant got his deposition transcript. He  
11 sent it in, he signed it, and came back with a supplemental  
12 affidavit. That affidavit explains that the points he made  
13 later in his deposition are exactly what he meant. He explains  
14 the testimony. That's precisely what is provided for in case  
15 law.

16 There are a number of cases in the Second Circuit that  
17 go right into this. One case in particular, Langman, L-a-n-g-  
18 m-a-n, Fabrics v Graph California, it's at 160 F.3d 106. There  
19 you had a situation that had multiple depositions, one  
20 affidavit, a second affidavit, and the question was, does that  
21 affidavit contradict, because you can, where it's a sham  
22 affidavit situation is the word the case law used, disregard  
23 it.

24 But where it explains, it amplifies, where the  
25 question that was asked originally wasn't really precise or

1 doesn't really get to the issue, you can explain that through a  
2 supplemental affidavit. That's exactly what was done here. It  
3 was permissible in Langman. In fact, in Langman, the Second  
4 Circuit said it was error for the district court not to allow  
5 that supplemental testimony. So we believe that supports our  
6 position, Your Honor.

7 MR. HADDAD: Your Honor, can I speak to that, Your  
8 Honor?

9 THE COURT: Sure.

10 MR. HADDAD: At page 86 of Mr. Groves' --

11 THE COURT: He's not talking about the endorsement,  
12 he's talking about something else.

13 MR. HADDAD: No, at page 46 of the -- at page 86 of  
14 the transcript, he was shown the exclusion page, and one narrow  
15 page. He wasn't talking to the entirety of the policy, he was  
16 talking to that one little page, page 2647.

17 THE COURT: I think you were going to say something  
18 else, which is that he wasn't talking about the Michigan law  
19 endorsement.

20 MR. HADDAD: And he also was not talking about the  
21 Michigan law endorsement. He was talking about page 2647.  
22 That's exactly what he was talking about.

23 MR. HEUER: He was talking about --

24 MR. HADDAD: Not the endorsement or the policy itself,  
25 which my question on page 70 was. It was about the policy.

1 MR. HEUER: But with due respect --

2 THE COURT: But the question wasn't about the policy.  
3 Read your question, it was about the endorsement.

4 MR. HADDAD: The page 86 was responding to Mr.  
5 Olshin's testimony -- questions.

6 THE COURT: No, I understand, but your question on 66  
7 was about the endorsement, not about the policy as a whole.

8 MR. HADDAD: Page 70 was about the policy. Page 70,  
9 the last question before we broke for lunch was very  
10 specifically --

11 THE COURT: Yeah, but it does.

12 MR. HADDAD: -- was the --

13 THE COURT: That doesn't bother me, because it's not  
14 qualified by Michigan. It does cover worker's compensation  
15 liability of Delphi. I mean, in --

16 MR. HADDAD: So that's -- wow, that's an interesting  
17 interpretation.

18 THE COURT: Well, I mean, it's what it says. You  
19 know, the first rule is just answer the question.

20 MR. HADDAD: He answered the question. With respect  
21 to each time I asked about the policy and the endorsement it  
22 said Delphi was the named insured, and was the insured  
23 employer, that's what he said.

24 THE COURT: Well, on 67 --

25 MR. HADDAD: On 66.

1 THE COURT: -- no, he -- as far as --

2 MR. HADDAD: And after he corrected his testimony  
3 once, and you get a shot at correcting your testimony, that's  
4 what Rule 30 provides, you get a shot at correcting it. You  
5 don't keep getting shots. I mean, you don't keep getting  
6 shots. Gee, when I read it, that's not what I meant, but I  
7 still didn't correct it until now in reply on summary judgment.  
8 I don't know that that -- I don't see a case that so provides.

9 MR. HEUER: Your Honor, the question was clear, "What  
10 entities are shown for being insured in the State of Michigan?"  
11 The answer was very clear.

12 THE COURT: That's fine.

13 MR. HADDAD: (indiscernible)

14 THE COURT: I didn't understand that.

15 MR. HADDAD: On 2647.

16 THE COURT: Okay. So on the Michigan law endorsement,  
17 why isn't "you," as used in paragraph 2 there, Delphi  
18 Corporation as opposed to someone else?

19 MR. OLSHIN: I'm sorry, Your Honor, I didn't hear the  
20 question.

21 THE COURT: What Mr. Haddad is arguing is that in the  
22 Michigan law endorsement, it states, "to help you understand  
23 the paragraph, the following definitions are added." Number 2,  
24 "You are the insured employer."

25 MR. OLSHIN: Right.

1 THE COURT: So Mr. Haddad says, well, "you" must be,  
2 mean Delphi Corporation because it's the only name on this  
3 endorsement, besides the insurer.

4 MR. OLSHIN: I think Your Honor hit the nail on the  
5 head. I mean, I think you have to go back and look at who was  
6 actually the insured employer in the State of Michigan.

7 THE COURT: So you're saying "you" means "you know who  
8 you are, you're the one who's insuring."

9 MR. OLSHIN: Yes, and you know who you are because  
10 you're listed on the Michigan extension of information page by  
11 name. Otherwise, their position is illogical. Because Delphi  
12 had ten or so entities that were at various times, and you  
13 named some of them, Packard Hughes, Delphi Diesel. So to use  
14 their interpretation, what this endorsement would do is it  
15 would make those entities not covered by the policy, because  
16 their name doesn't appear on this piece of paper, even though  
17 it appears on the Michigan information page. Because their  
18 reading of the policy is, you don't look at the policy as a  
19 whole, you just look at this piece of paper.

20 Secondly, I think if you follow opposing counsel's  
21 logic to an extreme, then the endorsement doesn't apply at all  
22 to 2001, 2002, and I'm sorry, 2000, 2001 and 2003, because  
23 Michigan doesn't appear on the information page on page 1 of  
24 those individual policies.

25 That can't be the intent of what is happening here.

1 The intent has to be -- I know the other side doesn't like to  
2 talk about intent, but when you read the policy as a whole, a  
3 policy that's approved by the Michigan Insurance Department.  
4 So from a carrier's point of view, the only reason we're using  
5 this document is because a regulator has told us we can.

6 And the regulator based, on Mr. Grody's (ph)  
7 affidavit, Exhibit 2, which is uncontested, approved not only  
8 the general section of the policy, but also approved the  
9 designated workplace exclusion endorsement.

10 So one would think that if those concepts were  
11 contrary to Michigan law, the regulator who's charged with  
12 approving policy forms would have rejected those policies, and  
13 not allowed us to issue them in the State of Michigan.

14 I think, Your Honor, the only conclusion you can draw  
15 is, the only logical way to read this policy is that this  
16 endorsement is part of a whole. And you have to interpret the  
17 whole. And there's nothing inconsistent between this  
18 endorsement and the concept that these entities which weren't  
19 approved to be self-insured are now the employer insured under  
20 the policy. It runs totally together.

21 The general conditions of the policy which exclude  
22 other insured and self-insured locations are consistent with  
23 the concept, as is the designated workplace exclusion  
24 endorsement.

25 MR. HADDAD: Two quick responses here. They're trying

1 to read way too much into submitting a form to a regulator.  
2 The policy wasn't approved, the form was approved. You can put  
3 any exclusion you want in your form so long as your Michigan  
4 law endorsement that's part of it, which is part of any  
5 submission. So long as you have that, the exclusionary  
6 language that you put in the back pages of it don't apply.

7 THE COURT: I mean other than --

8 MR. HADDAD: So that doesn't address the issue of this  
9 policy.

10 THE COURT: Right, but let me interrupt you. Other  
11 than the point, and I do take that seriously, believe me, that  
12 the named insured is listed as Delphi, there's nothing in  
13 Michigan law or in the endorsement that would require the  
14 endorsement to expand the coverage. It all hinges on who "you"  
15 is, right, who the reference to the employer is.

16 MR. HADDAD: Right. And what -- let's look at this  
17 from the big picture from the State, the point was earlier is  
18 the State qualified to advance the interests of the employees  
19 here. Let's look at it from the State's perspective from the  
20 big picture.

21 We get a Form 400, that's the only thing we get. We  
22 don't get these policies. We don't get the policies until  
23 years later if there's a dispute. So as far as we're  
24 concerned, Delphi Corporation is an insured employer, and  
25 that's what they told us from -- every year from 2000 all the



1 way up until 2009. That's what ACE said, we didn't tell them  
2 that. They said it.

3 We cannot -- this Court cannot, and we submit no court  
4 should be in a position to tell the State of Michigan, now all  
5 of a sudden if you want to make sure that people are doing this  
6 the right way, you now have to start reading every single  
7 policy of every single employer in the State of Michigan to  
8 decide whether or not there's an exclusion, this, that, or the  
9 other thing. Your Honor sees how big these policies are.

10 THE COURT: No, I don't --

11 MR. HADDAD: We only need to know, we only need to  
12 know that we have this. Once we have this, as Mr. Schrock  
13 testified, once we know that the policy's been issued, the  
14 name's Delphi, we know what the terms of that insurance are.  
15 It covers all their businesses in all the locations --

16 THE COURT: But what is --

17 MR. HADDAD: -- in that state.

18 THE COURT: But what -- let's just assume that, in  
19 fact, the employer is Delphi.

20 MR. HADDAD: I'm sorry?

21 THE COURT: Let's assume for the moment --

22 MR. HADDAD: Right.

23 THE COURT: -- that for purposes of this endorsement,  
24 it means that the covered employer is Delphi?

25 MR. HADDAD: Okay.

1 THE COURT: What good does that do the regulator?

2 MR. HADDAD: What good it does the regulator is  
3 precisely this. As soon as Delphi stops making good on its  
4 self-insurance commitment, as soon as they are no longer an  
5 approved self-insurer, we now know ACE Insurance Company, which  
6 issued this policy on these dates year after year after year  
7 filed its reports with the state, with this Form 400, year  
8 after year after year, is on the hook and is going to pay these  
9 people and the --

10 THE COURT: But the statute doesn't say that.

11 MR. HADDAD: I think the statute does say that.

12 THE COURT: Where does the statute say that?

13 MR. HADDAD: The statute says every policy for the  
14 issuance of insurance in worker's compensation insurance in  
15 this state will provide as follows. And the first thing it  
16 starts out with is notwithstanding the language to the contrary  
17 --

18 THE COURT: But, no, listen --

19 MR. HADDAD: -- that's where it provides.

20 THE COURT: -- maybe I wasn't clear. There's no  
21 reliance at the time by the regulator on this endorsement  
22 saying one thing or the other.

23 MR. HADDAD: You don't need reliance, Your Honor. The  
24 estoppel doesn't apply against --

25 THE COURT: No, but I mean, I'm not talking about

1 that. I'm just saying it doesn't serve any purpose, other than  
2 to enforce the policy.

3 MR. HADDAD: My house fire insurance doesn't serve any  
4 purpose until my house burns down. I mean, that's -- it's just  
5 there. It's just there, and in the event something happens,  
6 then we look to it, and we say, I expect you to pay. I expect  
7 you to pay because that's what you wrote in this policy.

8 I mean the worker's compensation agency needs to know  
9 who's the insurer, all these employees, all the cases --

10 THE COURT: I mean, I can see that argument for the  
11 Form 400. I guess I just don't really see it to something  
12 that's attached to the policy itself.

13 MR. HADDAD: Well, when it's attached to the policy  
14 itself, in accordance with the Michigan law, and in accordance  
15 with the statute, and it's unambiguous, and it says "you," and  
16 the only other reference on this to "you" is Delphi  
17 Corporation, you can't interpret it any other way. You can't  
18 interpret it any other way, Your Honor. "You" means "you." I  
19 don't mean to talk (indiscernible). What the definition of  
20 "you" is, but "you" means "you," and "you" is Delphi. Because  
21 there is nobody else. There is nobody else referred to here.  
22 There's nobody else referred to in item 3A, on all those  
23 policies from 2002 to the present.

24 THE COURT: I just -- I follow you with this, but I  
25 think you're changing the subject. As far as saying that all

1 that counts is this endorsement, I'm having a hard time seeing  
2 that. There's no regulatory policy of that.

3 MR. HADDAD: Oh, I disagree. There absolutely is a  
4 regulatory policy. It's set forth in the statute, Your Honor.  
5 And the statute says, we want to make sure that every policy  
6 contains these terms --

7 THE COURT: Right.

8 MR. HADDAD: -- and is enforceable in accordance with  
9 these terms, and we provide these terms, and we say Michigan  
10 law requires that we attach this paragraph to your policy, and  
11 the language specified by the statute. And to help you  
12 understand the paragraph, the following definitions are added,  
13 and we are the insurer issuing this policy, and you've got to  
14 look to where's the only -- well, it's ACE, because that's the  
15 authorized agent at the end, issued by, name of insurance  
16 company, and two -- look at the third line, issued by, name of  
17 insurance company, ACE, that's we and you are the insured  
18 employer. There's no one else listed on this document.

19 THE COURT: But the statute says that the insurer  
20 "issuing" the policy hereby contracts and agrees with the  
21 insured employer. I mean --

22 MR. HADDAD: Yeah, and the definition provides who the  
23 insured employer is. It can't be anyone else other than who it  
24 says plain -- in black and white on the page.

25 THE COURT: Okay. I guess we disagree on that. "You"

1 are the one who's been insured.

2 MR. HADDAD: I'm sorry?

3 THE COURT: "You" means the one who's been insured.

4 MR. HADDAD: You --

5 THE COURT: "You" are the insured employer. You are  
6 the one that's been insured. I mean, you're saying to me that  
7 --

8 MR. HADDAD: There's nothing in the definition of  
9 "you" that refers you to anything other than this page. It  
10 doesn't you are the insured employer as defined in section such  
11 and such, it does not say that.

12 THE COURT: No, it says, you are the insured employer.

13 MR. HADDAD: That's all it says, and the only name,  
14 there's a you and a we. Named insured, Delphi --

15 THE COURT: We are the ones issuing the policy.

16 MR. HADDAD: That's ACE.

17 THE COURT: And that policy doesn't cover --

18 MR. HADDAD: It covers you. Covers you. Who's you?

19 THE COURT: Let's say they put down name of insured,  
20 and let's just say the person was really having a bad day, so  
21 she put down Mr. Haddad instead --

22 MR. HADDAD: Uh-huh.

23 THE COURT: -- this would control? And the only one  
24 insured is Mr. Haddad, employer of two employees in Michigan.  
25 I mean, it can't be that. That can't be right.

1 MR. HADDAD: But you can't extend this to the absurd.

2 THE COURT: This totally modifies the contract.

3 MR. HADDAD: But this is named insured Delphi, they  
4 did it every single year for year after year and you can't just  
5 say dozens of people made dozens -- hundreds of mistakes going  
6 through this year after year after year.

7 THE COURT: With the Form 400s?

8 MR. HADDAD: What's that?

9 THE COURT: With the Form 400s?

10 MR. HADDAD: With the Form 400s, yeah, I wasn't going  
11 there, I was talking about the policy itself, which kept saying  
12 you is Delphi, but we can read that into it.

13 THE COURT: Delphi is the insured under the policy.  
14 It's the insured. That's why I'm not particularly -- I mean,  
15 you did ask in a separate question, which is, is he the insured  
16 employer. But his first answer is right, Delphi was the  
17 insured.

18 MR. HADDAD: Yes.

19 THE COURT: I mean, it was insured, it insured Delphi  
20 in Alaska and Alabama.

21 MR. HADDAD: Yeah, but I also asked him with respect  
22 to this endorsement.

23 THE COURT: I understand.

24 MR. HADDAD: And that's the critical question.

25 THE COURT: I understand, but I think --

1 MR. HADDAD: I wasn't talking about Alabama and  
2 Alaska, and they didn't interpret it that way either.

3 THE COURT: So he got tripped up on that.

4 MR. HADDAD: I don't think he was interpreting it that  
5 way either. He was very clear when I asked him those were the  
6 questions that were put there, and in the global question at  
7 the end, and individual questions, he keeps tying right back to  
8 Delphi being the named insured, it's exactly what's in the  
9 policy that was issued by this company.

10 I mean this authorized agent, the person whose name  
11 appears here, we don't have an affidavit from that person  
12 telling us what they thought when they signed this. We don't  
13 have anything like that, Your Honor.

14 THE COURT: If I find it's clear, I'm not supposed to  
15 get it.

16 MR. HADDAD: Well, I understand that. They're the  
17 ones asking for reformation. My view is --

18 THE COURT: I'm not focusing on reformation. I'm  
19 really not --

20 MR. HADDAD: -- I think it could be enforced in  
21 accordance with that language because that's who the insured  
22 is, Delphi.

23 THE COURT: All right. Anything else?

24 MR. HOGAN: Your Honor, Al Hogan for DPH. I've been  
25 lucky enough to be here many times. I think as in the past

1 Your Honor has apprehended all of the points with respect to  
2 the Michigan law endorsement.

3 I think you apprehended later on, and I think you  
4 posited a hypothetical, if the name insured up here instead of  
5 saying Delphi Automotive Systems Corporation and Delphi  
6 Corporation, if it had listed out Delphi Packard and Delphi  
7 Hughes, the entities that were intended to be covered that were  
8 the non-self insured entity, there would be no problem under  
9 Michigan law. And I don't think that the Michigan defendants  
10 disagree with that.

11 And so then I think the only question you focused on  
12 in the last few minutes is does the Michigan law endorsement  
13 require you to read Delphi Corporation as the named insured as  
14 also being insured employer. And the reason why I don't think  
15 you do that is because this Michigan law endorsement is not a  
16 free standing policy, it's attached to a policy. It actually  
17 says that.

18 It says the Michigan law requires that we attach this  
19 paragraph to your policy. Again, it's referring to the "you."  
20 Who is "you?" I think you have to go and look at the policy.

21 This Michigan law endorsement is a form and in the  
22 context of this policy which I'm sure there are some that it  
23 was complicated, but not many that was complicated for Michigan  
24 employers, I don't think you can lift this endorsement out,  
25 look at one page and say, we can figure out who the insured



1 employer is by looking exclusively at this page.

2 I think it's completely reasonable, as Your Honor has,  
3 to focus on the entirety of the policy, and look at to who the  
4 actual entities are that were covered under the Michigan  
5 information page. And then you said something that I think  
6 really seals it, and that is, interpreted the way the Michigan  
7 defendants would have it, the resulting policy would result in  
8 a situation where you have the self-insured entity, Delphi  
9 Corporation also covered by this duplicative coverage, but you  
10 would have all of the non-self insured entities totally  
11 unprotected. The reading that they espouse would result in  
12 finding that for its entire history, all of these various un-  
13 self-insured entities were actually out there acting in  
14 violation of the worker's compensation law.

15 And so when you read a contract, and you look at one  
16 page and it leads up to an absurd result, but when you back up  
17 and read the entire contract and it leads you to something that  
18 is not inconsistent with the statute, and appears to line up  
19 with exactly the way the rest of the policy works, I think  
20 that's what contract interpretation is all about. And I think  
21 that's where the discussion has led us.

22 So we agree with ACE's reading of it, we agree with  
23 your skepticism that the named insured somehow modifies the  
24 entire policy for our purposes.

25 MR. HADDAD: Your Honor, may I just respond to Mr.

1 Hogan?

2 Two points. If we want to talk about an absurd  
3 result, an absurd result is not enforcing the contract as  
4 written. But beyond that, think about what occurred in the  
5 Titan case from earlier this year, the Supreme Court. The  
6 insurance applicant committed fraud, he actually committed  
7 actual deliberate intentional malicious fraud against the  
8 insurance company and get the policy. And the State said,  
9 well, there's a minimum basis of insurance, and once you issue  
10 a policy, you're bound to that minimum amount of coverage.  
11 With respect to something beyond that, that's between you and  
12 the insurance coverage, and I'll let you at least contest that  
13 issue, but you're bound to this.

14 Applying that here, once they issue this policy,  
15 they're bound to this level of coverage for Delphi. How is the  
16 State supposed to know otherwise? What -- how are we supposed  
17 to know oh, the fact that they filed this, the fact that they  
18 prepared this, the fact that they issued this year after year  
19 after year, we're going to come -- and the time comes to pay  
20 that we're just not going to pay.

21 How is a State, how is --

22 THE COURT: They'd read the policy.

23 MR. HADDAD: We're going to read the policy of  
24 hundreds of thousands of employees -- of employers in the  
25 State. As you can see, there are hundreds and hundreds of

1 pages long, or do we just apply the State's policy, public  
2 policy as set forth in its own statutes by -- enacted by its  
3 legislature, signed by its governor which says, every worker's  
4 compensation policy will provide this. That way everybody  
5 knows. Employers know, employees know, and insurer's --

6 THE COURT: But it does provide this. You're just  
7 saying --

8 MR. HADDAD: To whom? To the person --

9 THE COURT: -- that this means they are the employer.

10 MR. HADDAD: That's what it says, that's what I'm  
11 saying, and I don't see how a state can interpret it any other  
12 way. I don't see a state can be compelled to look behind that  
13 -- how an agency can be compelled to look behind each and every  
14 policy that's issued in the state to make sure what's in there,  
15 what's excluded, what's not excluded. It doesn't work that  
16 way.

17 THE COURT: It's going to sue on a policy. It'll sue  
18 on the policy.

19 MR. HADDAD: It'll sue on the policy. It needs to  
20 know that this policy is going to be enforceable. We're not  
21 going to get into this question of the who is "you." That not  
22 is a question, that this statute's designed -- the statute is  
23 designed to prevent that question before --

24 THE COURT: The statute is designed to prevent you  
25 having to go against two insurers for the same company.

1 MR. HADDAD: Excuse me?

2 THE COURT: The statute is designed to prevent you -  
3 if, again, the insurance policy had provided that it was going  
4 to cover half the people at Packard Hughes, then that would not  
5 be enforceable. They would be bound by this endorsement,  
6 because they're not allowed to cover half. That's what binds  
7 them. They have to cover everyone at the insured. That's the  
8 purpose of the statute.

9 MR. HADDAD: To cover all of the employees --

10 THE COURT: At the insured.

11 MR. HADDAD: -- of "you," and "you" is Delphi, and we  
12 can't look behind that, Your Honor. I think that poses an  
13 unreasonable burden on --

14 THE COURT: I guess --

15 MR. HADDAD: -- the State. I think it's contrary to  
16 the public policy as enunciated in the state and in the  
17 legislature and in the --

18 THE COURT: Why is -- there's nothing to say it's an  
19 unreasonable burden. I read these policies this morning. I  
20 read them between the hours of 8:30 and 9:30. I went through  
21 -- I think I asked pretty good questions and I got it. You  
22 know, I mean, it's not that burdensome. And there's no pre-  
23 regulatory purpose. The pre-regulatory purpose is all based on  
24 the dealing with self-insurers, and whether they're allowed to  
25 self-insure. This is just gravy.

1           So other than not being able to split up people with  
2           the insurer, yeah, look at the policy. I mean, it doesn't  
3           override the contract that way. It doesn't say if you get it  
4           wrong, you're bound. It doesn't say that. It doesn't say if  
5           you put down the wrong name, you're bound. It says that the --  
6           again, it says that "the insurer issuing this policy hereby  
7           contracts and agrees with the insured employer," and among  
8           other things that in E --

9           MR. HADDAD: Yep.

10          THE COURT: -- "this insurance contract or policy  
11          shall for all purposes be held and deemed to cover all the  
12          business the said employer is engaged in." But it doesn't  
13          vouch, it doesn't say we represent and warrant that we are the  
14          insurer and you are the employer.

15          MR. HADDAD: Yeah, well, I would disagree with that.  
16          It says --

17          THE COURT: It doesn't say that.

18          MR. HADDAD: -- we're the insurer issued by, name of  
19          insurance company, ACE.

20          THE COURT: Issuing this policy.

21          MR. HADDAD: Issuing this policy, named insured,  
22          Delphi Corporation. You are the insured employer. We now have  
23          to look to hundreds of pages --

24          THE COURT: All right. That depends --

25          MR. HADDAD: -- and I know Your Honor could do that

1 because --

2 THE COURT: -- on who "you" is again. That doesn't  
3 depend on the fact that, you know, they've signed it. I just  
4 -- I don't -- you know, the policy says who it covers. And  
5 which is, you know, the employer. It doesn't say that you are  
6 the employer.

7 MR. HADDAD: Well, it says, you are the insured  
8 employer.

9 THE COURT: Yeah.

10 MR. HADDAD: It does say, you are the insured  
11 employer. It doesn't say Delphi Diesel is the insured  
12 employer, it says "you," and the only "you" here is Delphi  
13 Corporation, and to hold otherwise would be to read something  
14 into this endorsement that does not apply, when the endorsement  
15 itself says, any provision to the contrary in this policy, Your  
16 Honor, any provision to the contrary elsewhere in this entire  
17 policy is deemed modified hereby and conflicting provisions are  
18 made null and void.

19 Anything not in harmony with this is deemed modified.  
20 So if you want to say -- if this Court wants to say, if ACE  
21 wants to say, well, there's provisions in this policy that  
22 suggests that the insured employer is someone else, that's  
23 modified by this. That provision, Your Honor, H, conflicting  
24 provision, that's a very critical provision here. It modifies  
25 everything else in those hundreds of pages to harmonize it

1 right with this. And that's the provision, Your Honor, we  
2 pointed that out in my opening comments. It all keeps coming  
3 back to that. The remainder of the stuff that Mr. Olshin's  
4 colleagues point to in their papers, it has to be modified and  
5 harmonized to comport with this, and this says "you" is Delphi.  
6 And that's what that says, Your Honor.

7 THE COURT: Okay. All right.

8 Okay. I have before me two motions for summary  
9 judgment in this adversary proceeding. I have a motion by the  
10 Plaintiffs, ACE American Insurance Company and Pacific  
11 Employers Insurance Company, which I sometimes refer to "ACE."  
12 And I also have a motion for summary judgment by Defendants,  
13 State of Michigan Worker's Compensation Agency, and State of  
14 Michigan Funds Administration, which I sometimes refer to as  
15 the "Michigan defendants."

16 As a threshold matter, it was contended in the first  
17 time in this very long running adversary proceeding by the  
18 Michigan defendants that I cannot determine this motion without  
19 adding as a necessary party all of the ultimate beneficiaries  
20 of the insurance policies at issue, and that is, all the actual  
21 and potential worker's compensation claimants employed by any  
22 of the arguable employers covered by the policies at issue.

23 I conclude, though, that such people are not  
24 indispensable to this litigation, given that their interests  
25 are adequately represented by the Michigan defendants. Indeed

1 it appears to me to be the case that the Michigan defendants,  
2 in fact, have a greater interest in succeeding in this  
3 litigation than the individual worker's compensation claimants.  
4 That is because this litigation is about who will pay that  
5 portion of the worker's compensation claims that is not paid in  
6 tiny bankruptcy dollars by the Delphi debtors; i.e., whether  
7 the insurer plaintiffs will pay or the Michigan defendants pay.

8 Either way, it appears clear to me that, although  
9 payment has been delayed as a result of this litigation, the  
10 worker's compensation claimants will ultimately be paid by  
11 either the plaintiffs or the Michigan defendants.

12 Consequently, Michigan worker's compensation  
13 claimants' interests are adequately represented in this  
14 particular litigation as to who shall pay. See generally  
15 Continental Casualty Company v. American Home Assurance  
16 Company, 2008 WL 1752231 S.D.N.Y. (April 14, 2008) at page 4.  
17 See also National Union Fire Insurance Company of Pittsburgh v.  
18 Mason Perrin and Kanovsky, 709 F.Supp. 411, 415 (S.D.N.Y 1989),  
19 and Midwest Employers Casualty Company v. East Alabama Health  
20 Care, 170 F.R.D. 195, 198 (MD Ala. 1996).

21 And turning to the summary judgment motions; under  
22 Federal Rule of Civil Procedure 56(a), incorporated by  
23 Bankruptcy Rule 7056, the Court shall grant summary judgment if  
24 the movant shows that there's no genuine dispute as to any  
25 material fact and is entitled to judgment as a matter of law.



1 Subject to the relevant sections of the Rule, a party asserting  
2 that a fact cannot be raised as generally disputed must support  
3 the assertion by citing to particular facts -- I'm sorry, to  
4 particular parts of the record, including depositions,  
5 documents, or electronically stored information, affidavits, or  
6 declarations, stipulations, admissions, interrogatory answers,  
7 or other materials, or by showing that the record does not  
8 establish the absence or presence, as the case may be, of a  
9 genuine dispute, Federal Rule of Civil Procedure 56(c)(1).

10 The movant bears the initial burden to satisfy each  
11 material element of its claim or defense. Vermont Teddy Bear  
12 Company v. 1-800-BEARGRAM Company, 373 F.3d 241, 244 (2d Cir.  
13 2004); Isaac v City of New York, 701 F.Supp.2d 477, 485  
14 (S.D.N.Y 2010), aff'd, 271 Fed. Appx. 60 (2d Cir. 2008).

15 To contest such a showing, the non-moving party must  
16 provide evidence of a genuine issue of material fact to  
17 successfully oppose the motion. Matsushita Elec. Indus. Co. v.  
18 Zenith Radio Corp, 475 U.S. 574, 586 (1986). Facts are  
19 material if they might affect the outcome of the suit under the  
20 governing law. Anderson v. Liberty Lobby, 477 U.S. 242, 248  
21 (1986). The Court is "not to weigh the evidence but is instead  
22 required to view the evidence in the light most favorable to  
23 the party opposing summary judgment, to draw all reasonable  
24 inferences in favor of that party, and to eschew credibility  
25 assessments." Amnesty Am. v. Town of W. Hartford, 361 F.3d 113,

1 122 (2d Cir. 2004).

2 Thus a summary judgment motion may not be defeated by  
3 conclusory or self-serving statements, by simply raising  
4 metaphysical doubts about a material fact, or by identifying  
5 immaterial disputed facts, *Anderson v. Liberty Lobby*, 477 U.S.  
6 at 247-48, and *Matsushita Electric*, 475 U.S. 586, although "if  
7 there is any evidence in the record from any source from which  
8 a reasonable inference in the non-moving party's favor may be  
9 drawn [on a material issue], the moving party simply cannot  
10 obtain a summary judgment." *Binder & Binder PC v. Barnhart*,  
11 481 F.3d 141, 148 (2d Cir. 2007); see generally *Matsushita*  
12 *Electric*, 475 U.S. at 586.

13 Of course, where the parties do not dispute the  
14 material facts, disagreeing instead on the outcome based on  
15 applicable law, the matter is appropriate for summary judgment.  
16 *Adirondack Transit Lines, Inc. v. United Transp. Union*, 305  
17 F.3d 82, 84 (2d Cir. 2002). That is true, among other factual  
18 contexts, in contexts where the parties are disputing the  
19 plain, unambiguous meaning of a controlling document or  
20 documents. See *Vermont Teddy Bear Company v. 1-800-BEARGRAM*,  
21 373 F.3d at 244. That is because, "if a contract is  
22 unambiguous on its face, its proper construction is a question  
23 of law. *Metropolitan Life Insurance Company v. RJR Nabisco*,  
24 *Inc.*, 906 F.2d 884, 889 (2d Cir. 1990).

25 In such situations, of course, the Court should not

1 look beyond the plain language of the contract to parol  
2 evidence, *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d  
3 69, 73 (2d Cir. 1989): see also *In Re Ionosphere Clubs, Inc.*,  
4 147 B.R. 855, 861-62 (Bankruptcy S.D.N.Y. 1992).

5 Here, the ACE insurers' motion seeks summary judgment,  
6 as Mr. Olshin noted, on three different issues. First, it  
7 seeks summary judgment on whether the insurers are liable under  
8 deductible policies issued to Delphi Corporation or its  
9 predecessor for years 2000, 2001, 2003, 2004, 2005, 2006, 2007,  
10 2008 insofar as it is asserted that those deductible policies  
11 insure claims against Delphi and its subsidiaries and  
12 affiliates that are self-insured.

13 Separately, the ACE insurers' motion seeks summary  
14 judgment declaring that if, for some reason, the foregoing  
15 policies do not provide unambiguously for the limitations in  
16 coverage that the motion asserts, that the policies should be  
17 reformed under Michigan law to so provide.

18 And, third, the motion seeks a declaration on a  
19 summary judgment basis that under separate, so-called retention  
20 policies for the applicable years, the insurers have no  
21 obligation until the self-insured retention is covered (those  
22 policies being excess policies over the self-insurance carried  
23 by the Delphi entities named in those policies).

24 The Michigan defendants seek summary judgment  
25 declaring that, to the contrary, the deductible policies that

1 I've listed do, in fact, provide for insurance not only for un-  
2 self-insured subsidiaries of Delphi, but also for Delphi and  
3 its self-insured subsidiaries and affiliates.

4 As set forth at the start of this hearing, there's no  
5 dispute that there is not a relevant deductible policy for the  
6 October 1, 2002 through October 1, 2003 year, and, therefore,  
7 that there's no basis for liability on the deductible policy  
8 theory for the ACE insurers [for that year].

9 In addition, it's undisputed that the retention  
10 policies do not create additional drop-down liability; i.e.,  
11 that there's no coverage owed by the insurers until the self-  
12 insured retention is satisfied. Therefore, as far as those two  
13 points are concerned, the insurers' summary judgment motion is  
14 granted.

15 The insurers base their summary judgment motion in  
16 respect of the deductible policies issue on three contentions,  
17 which they combine together in an overall context, but which I  
18 have uncoupled in light of my view that the applicable  
19 deductible policies are in fact unambiguous and plainly provide  
20 that they cover only the Delphi subsidiaries covered thereby  
21 pursuant to the policies' plain terms, as I'll explain in a  
22 moment.

23 I therefore conclude that it's inappropriate to  
24 consider, in addition to the plain meaning arguments that the  
25 ACE insurers make, the ACE insurers' arguments that parol

1 evidence, including documents submitted by underwriters and to  
2 third parties, go to establish or help to establish their  
3 interpretation of the contract.

4 I have considered the insurers' other argument,  
5 however, which is a statutory argument but I did not base my  
6 ruling on the insurers' statutory argument. Rather, I base it  
7 on my view of the plain meaning of the applicable policies.

8 But I should address the statutory argument first.  
9 The insurer's contend that under the controlling statute which  
10 is MCL 481, and, more specifically, MCL 481.611, and arguably  
11 621, the Delphi entities were -- who are self-insured, were  
12 precluded by law from separately obtaining insurance under the  
13 deductible policies from the ACE insurers.

14 As I stated, this argument is primarily based on  
15 Michigan Compiled Laws, Section 6.11. That section states,  
16 "Each employer under this Act [which is the Worker's Disability  
17 Compensation Act], subject to the approval of the director,  
18 shall secure the payment of compensation under this Act by  
19 either of the following methods: (a) by receiving  
20 authorization from the director to be a self-insurer. In the  
21 case of an individual employer, the director may grant that  
22 authorization upon a reasonable showing by the employer of the  
23 employer's solvency and financial ability to pay the  
24 compensation and benefits provided for by in this Act, and to  
25 make payments directly to the employer's employees, as the

1 employees become entitled to receive the payment under the  
2 terms and conditions of this Act, and pursuant to regulation  
3 408.43(c) of the Michigan Administrative Code, if the director  
4 determines it to be necessary, the director shall require the  
5 furnishing of a bond or other security in a reasonable form and  
6 amount. Such security as may be required by the director may  
7 be provided by furnishing specific excess insurance, aggregate  
8 excess insurance coverage through a carrier authorized to write  
9 in this state, in an amount acceptable to the director, a  
10 surety bond, an irrevocable letter of credit format acceptable  
11 to the bureau, and claims payment guarantees; (b) by insuring  
12 against liability with an insurer authorized to transact the  
13 business of worker's compensation insurance within the State of  
14 Michigan." And then it is also pointed out that insurance can  
15 be obtained for worker's compensation obligations by a pooling  
16 of insurance.

17 The ACE insurers contend that by using the word -- the  
18 phrase "either of the following methods," the statute is  
19 written in the disjunctive, so that only one of the following  
20 methods may be used.

21 I do not read the statute so narrowly. It doesn't  
22 preclude a combination of the following methods. Although it  
23 is the case that where an individual employer does not make a  
24 sufficient showing of its solvency and financial ability, the  
25 director may require additional security only in the specified

1 means set forth in subsection (a), which does not include a  
2 deductible policy like the ones at issue, nevertheless, I do  
3 not believe that the plain reading of the statute specifically  
4 precludes the issuance of insurance through a deductible policy  
5 while at the same time the insured is self-insured for worker's  
6 compensation.

7 The ACE insurers' interpretation is also belied,  
8 although only as a matter of practice, not as a legal matter,  
9 as a matter of interpretation of the statute, by the  
10 Eisenheimer affidavit. Now, Mr. Eisenheimer is in fact the  
11 director, so I should accord deference to his interpretation of  
12 the statute over which he's been placed as the director, and I  
13 do so; and he notes that there are many instances, although a  
14 minority, where, in fact, such a situation where a self-insured  
15 employer also obtained insurance for worker's compensation  
16 through a deductible policy.

17 All things considered, then, it appears to me that  
18 there's not a plain meaning statutory preclusion to the  
19 obtaining by the self-insured Delphi entities of additional  
20 deductible insurance. I'm not willing to place preclusive  
21 emphasis on the word "either" under these circumstances,  
22 somewhat additionally cautioned not to do so by the Supreme  
23 Court's recent wrestling with the meaning of the word "or" in a  
24 statute, Radlax Gateway Hotel LLC (ph) v Amalgamed Bank (ph),  
25 132 S. Ct. 265 -- I'm sorry 2065 at page 2072 (2012).

1 I'm not persuaded that the other section of the  
2 Worker's Disability Compensation Act cited by the ACE insurers  
3 adds anything to their argument. They state that MCL Section  
4 418.621 bolsters their argument that a self-insured employer  
5 cannot also obtain a deductible policy. They rely on  
6 418.621(2), which states, "The state accident fund and each  
7 insurer issuing an insurance policy to cover any employer not  
8 permitted to be a self-insurer under section 611, shall insure,  
9 cover and protect in the same insurance policy, all the  
10 businesses, employees, enterprises, and activities of the  
11 employer."

12 And then they point also to Subsection 4 of that  
13 section, which states, "except as modified by the director as  
14 provided for herein, each policy of insurance covering worker's  
15 compensation of this state shall contain the following  
16 provisions."

17 Subsection 2 does not contain the preclusion of the  
18 issuance of a separate policy. It just states that a state  
19 accident fund issuing an insurance policy to cover an employer  
20 not permitted to be a self-insurer, as opposed to an insurer  
21 under Section 611(1), shall insure all of the business,  
22 employees or enterprises covered by that employer.

23 That is, I don't believe it has the preclusive effect  
24 that is argued by the ACE insurers. Clearly, there's no case  
25 that makes that argument under Michigan law.



1           It's argued by the insurers that the retention  
2 policies that they issued don't have to have the Michigan law  
3 endorsement set forth in Subsection 4 of 621; however, I don't  
4 believe that that again is a bar to the issuance of a  
5 deductible policy where an employer is self-insured.

6           So as a summary judgment matter, I do not find that  
7 the Michigan statute -- statutory sections, relied upon by the  
8 ACE insurers entitle them to the relief they're seeking in the  
9 context of their administration by the Michigan worker's  
10 compensation insurance structure.

11           I do, as I said, though, find and conclude that the  
12 plain meaning of the applicable deductible policies requires  
13 the grant of the ACE insurers' motion. I have carefully gone  
14 through each of the deductible policies as well as closely  
15 questioned ACE's counsel on the meaning of their terms. And it  
16 is clear to me, from that review, that by their terms each of  
17 the policies excludes Delphi Corporation or Delphi Automotive  
18 System Corporation, it's predecessor, which is listed at the  
19 top of each policy as the named insured, and its affiliates and  
20 subsidiaries doing business in Michigan except as specifically  
21 provided in each of the policies.

22           With the exception of relying upon the so-called  
23 "Michigan law endorsement" that appears in each of the policies  
24 in the same form (except with the changes to the named insured  
25 as being Delphi Corporation) or Delphi Automotive Systems

1 Corporation, the Michigan defendants do not contest the plain  
2 meaning interpretation set forth by the ACE insurers. Nor do I  
3 believe they could given the plain meaning of the applicable  
4 policies.

5 Most of the policies, that is all the policies besides  
6 the 2000 and 2001 policies, specifically exclude from the  
7 coverage of the policies in a designated workplace exclusion  
8 endorsement all of the entities who are covered by the named  
9 retention policy in the exclusion. A sample exclusion, which  
10 is in essence the same in each of the policies that I've  
11 listed, that is, the policies other than 2000 and 2001, can be  
12 found at Bates number 002498 in respect of the 2008 policy.

13 Page 1 of that policy and page 1 of the other policies  
14 that have the exclusion specifically states, "this policy  
15 includes these endorsements and schedules, see schedules of  
16 forms and endorsements," which refers to, among other forms,  
17 the designated workplaces exclusion endorsement.

18 With respect to the 2000 and 2001 policies, each  
19 policy provides that part 1 of the policy applies to the  
20 worker's compensation law of the states listed here, and refers  
21 the reader either to "a per information page attached." The  
22 policies cover many states besides Michigan. And certain  
23 states including Michigan have their own information page  
24 attached.

25 The information page attached for Michigan appears at

1 Bates number 000348 with a 2000 policy and Bates number 000830  
2 for the 2001 policy. It lists only specific entities in each  
3 of those attachments or information pages. For the 2001 -- I'm  
4 sorry, for the 2000 policy, Packard Hughes Engineering Service,  
5 Delphi Diesel Systems are listed, and for 2001, Allied Signal  
6 Environmental Catalyst is listed.

7 It is clear from that construct that the terms of the  
8 policies and the insureds under the policies with respect to  
9 Michigan entities, are limited, therefore, to those entities  
10 and no others.

11 With respect to those two policies, that's supported  
12 by general sections A and B of the policy which refer to the  
13 employer named in item 1 of the information page, and again,  
14 the face page of each of those policies states that part 1 of  
15 the policy applies to the worker's compensation law of the  
16 states listed here, "per information attached," or "information  
17 page attached," excuse me. It has not been argued to the  
18 contrary with respect to those two policies by the Michigan  
19 defendants.

20 The Michigan defendants did argue in their memoranda  
21 that various other insureds' extension endorsements in the  
22 other deductible policies and extension of information pages,  
23 such as appear in the 2008 policy at Bates number 002520 and  
24 2521, argue that those were places in Michigan and entities,  
25 Delphi entities, doing work, and those places are covered by

1 the policies, but I conclude that the exclusion page and  
2 exclusion endorsement that appears in each of the policies  
3 controls with respect to those policies, very clearly providing  
4 that the policy does not cover, or conducted at or from the  
5 entities listed in those policies that I referred to in the  
6 exclusion endorsement.

7 At oral argument, the Michigan defendants made it  
8 clear that they were relying as far as plain meaning is  
9 concerned only on the Michigan law endorsement, which I  
10 referred to earlier; and, again, a sample of that appears at  
11 Bates number 002650. The purpose of the Michigan law  
12 endorsement is to comply with the section of the Michigan  
13 Worker's Disability Compensation Act that I previously quoted,  
14 Section 418.621.

15 That section and subsection 2, again, provides that  
16 "[t]he state accident fund and each insurer issuing an  
17 insurance policy to cover any employer not permitted to be a  
18 self-insurer under Section 611, shall insure, cover and protect  
19 in the same insurance policy, all the businesses, employees,  
20 enterprises, and activities of the employer."

21 The insurers argue that this requirement only applies  
22 to insurers issuing a policy that doesn't cover the self-  
23 insurer, and therefore would not apply to the deductible  
24 policies to the extent that it's argued by the Michigan  
25 defendants that they actually do cover self-insurers.

1 Paragraph, or subparagraph 4 of subsection 621 states,  
2 "Except as modified by the director as provided for herein,  
3 each policy of insurance covering worker's compensation in this  
4 state shall contain the following provisions." And, in fact,  
5 those provisions which appear in subsection 4 are then stated  
6 in the Michigan law endorsement that appears in each of the  
7 deductible policies. Again the sample being 0002650.

8 That endorsement, as required by the statute, states,  
9 "Notwithstanding any language elsewhere contained in this  
10 contract or a policy of insurance, the accident fund or the  
11 insurer issuing this policy hereby contracts and agrees with  
12 the insured employer," and then subsections A through G set  
13 forth the contract mandated by Section 418.621(4).

14 In each section, it is clear that the undertaking,  
15 whether it's for compensation, medical services, rehabilitation  
16 services, funeral services, scope of the contract, obligations,  
17 assumed termination notice or the like, applies to obligations  
18 for workers or workman's compensation or medical or  
19 rehabilitation or funeral services or the like, which the  
20 insured employer may become liable under the provisions of the  
21 Michigan Worker's Compensation Act during the life of this  
22 contract or policy.

23 That is, the contractual undertakings refer to the  
24 "insured employer" under the specific contract or policy of  
25 insurance. For example, subsection E, "scope of contract,"

1 says, "that this insurance contract or policy shall for all  
2 purposes be held and deemed to cover all the business the said  
3 employer is engaged in at the time of the issuance of this  
4 contract or policy, and all other business, if any, the  
5 employer may engage in during the life thereof, and all  
6 employees the employer may employ in any of his businesses  
7 during the period covered by this policy."

8 And the last undertaking in the Michigan endorsement -  
9 - H -- states, "That all the provisions of this contract, if  
10 any, which are not in harmony with this paragraph are to be  
11 construed as modified hereby, and all conditions and  
12 limitations of the policy, if any, conflicting herewith, are  
13 hereby made null and void."

14 The first clause of the Michigan law endorsement  
15 states, "This endorsement applies only to the insurance  
16 provided by the policy, because Michigan is shown in item 3(a)  
17 of the information page." My reading of that language means  
18 that it applies literally only to the insurance provided by the  
19 policy, the word "only" modifying the first noun after it,  
20 which is "insurance provided by the policy."

21 I do not believe, as is argued by the Michigan  
22 defendants, the word "only" modifies the word "because;" i.e.,  
23 that this endorsement is being provided only because Michigan  
24 requires it. I believe that, consistent with all the  
25 references to the policy and to the employer, the first clause

1 of the policy makes it clear, it applies only to the insurance  
2 provided by the policy. I.e., it does not create a new policy  
3 as far as the insured and the insurer. Instead, it requires  
4 that the policy be modified as set forth in provisions A  
5 through H of the endorsement.

6 Nevertheless, the Michigan defendants contend that  
7 even if, as I've found to be the case, the applicable  
8 deductible policies do not cover Delphi Corporation, and that  
9 Delphi Corporation is not the insured employer under those  
10 policies, the Michigan law endorsement renders Delphi  
11 Corporation the insured employer.

12 The Michigan defendants contend this because above the  
13 Michigan law endorsement is a field which states the named  
14 insured is Delphi Corporation under a specific policy number,  
15 with the effective date of the endorsement, and setting forth  
16 the policy period and the insurer.

17 The listing of Delphi Corporation in that field again  
18 lists it as the main insured. It does not list it as the  
19 insured employer. And it is the insured employer, and then the  
20 specific policy, that subsections A through H, which are  
21 required under MCL 418.621(4), refer to. However, the Michigan  
22 law endorsement also includes the following provision,  
23 "Michigan law requires that we attach this paragraph to your  
24 policy in the language specified by the statute. To help you  
25 understand the paragraph, the following definitions are added.

1 (1) We are 'the insurer issuing this policy'; (2) You are the  
2 'insured employer', 'Michigan Workman's Compensation Act means  
3 the Workers Disability Compensation Act of 1969, Workman's  
4 Compensation means worker's compensation, the Bureau of  
5 Workman's Compensation means the Bureau of Worker's Disability  
6 Compensation'."

7 The Michigan defendants contend that the statement  
8 "You are the insured employer" refers to the named insured on  
9 the page, Delphi Corporation, notwithstanding the fact, as I  
10 found at least, that the insurance policies do not provide for  
11 insurance for Delphi Corporation and instead provide for  
12 insurance for specific entities that are listed on the Michigan  
13 information pages for the 2000/2001 policies or are listed in  
14 the information pages in the other policies to the extent not  
15 excluded by the exclusion endorsement.

16 The Michigan defendants argue that the reference to  
17 "you" in the Michigan law endorsement can only mean Delphi  
18 Corporation. I conclude, however, to the contrary. I believe  
19 the reference to "you" in this endorsement can apply only to  
20 the you, the entity, that is, in fact, insured under the  
21 applicable policy, consistent with all of the references to the  
22 policy in the endorsement and, most specifically, consistent  
23 with the fact that ACE American Insurance Company is the  
24 insurer issuing this policy only in respect of a policy that  
25 provides insurance coverage for a specific entity.



1 And as I found none of the policies provide specific  
2 insurance coverage for Delphi Corporation under the Michigan  
3 worker's compensation statute, to read the Michigan law  
4 endorsement as the Michigan defendants have argued, would have  
5 the effect of actually excluding the entities who are, in fact,  
6 insured under the applicable policies, since they are not  
7 listed as the named insured in the field that is at the top of  
8 the endorsement.

9 It is clear to me that the listing at the top of the  
10 field for Delphi Corporation properly lists "the insured,"  
11 since Delphi Corporation is "the insured" under the applicable  
12 policy, but that it does not refer to the actual insured  
13 employer for purposes of the Worker's Compensation Act of  
14 Michigan because those employers are specifically identified in  
15 the applicable policies.

16 In addition, the Michigan law endorsement is made part  
17 of the insurance policy itself, and, in light of that, I find  
18 that no provision of the policy in fact does conflict with the  
19 Michigan law endorsement, in that the endorsement refers to the  
20 specific insured employer under the specific policy and that,  
21 or those, insured employers, as I believe are uncontroverted,  
22 have not breached any of the undertakings set forth in  
23 paragraphs A through G of the endorsement or as required by MCL  
24 621 -- I'm sorry 418.621(4).

25 Consequently, I conclude that as a matter of law the

1 plain meaning of the statute -- of the contracts, requires the  
2 grant of the ACE insurers' motion, and the denial of the  
3 Michigan defendants' motion, for summary judgment. As noted,  
4 interpretation of a contract is a matter of law; as a result, I  
5 conclude that Mr. Groves' admission at line 16 of page 66 of  
6 his declaration -- that the "insured employer" in paragraph 2  
7 of the Michigan endorsement is Delphi Corporation is correct --  
8 is irrelevant to my determination.

9 In addition, it is clear both from his deposition and  
10 his supplemental declaration, which does not conflict with that  
11 admission that I've just cited to that he, like ACE generally  
12 takes the position that the applicable policy that he was being  
13 questioned on does not provide for insurance for Delphi itself  
14 but only for the specific entities that are not excluded and/or  
15 that are covered on the extension of information page in the  
16 policy. See page 86 of his deposition.

17 I believe that in the context of the questioning, I  
18 can and should consider his supplemental declaration, for what  
19 it's worth. But, again, ultimately, I conclude based on my  
20 reading of the contract as a whole and the applicable statute  
21 that requires the Michigan endorsement, that the plain meaning  
22 of the contract is clear, and that the Michigan endorsement  
23 does not rewrite the contract to provide for a different  
24 insured employer, namely only Delphi Corporation but, rather,  
25 provides that the contract, to the extent that it would provide

1 to the contrary, (and, in fact, it does not provide to the  
2 contrary), but if it provided for the contrary, rewrites the  
3 contract so that for the actual insured employers it conforms  
4 with the undertaking set forth in paragraphs A through G of the  
5 Michigan endorsement -- A through H, excuse me, as well as set  
6 forth in A through H of Subsection 621(4) of Chapter 418 of the  
7 Worker's Disability Compensation Act.

8           Given that interpretation of the contract on its plain  
9 terms, or the contracts on their plain terms, it is unnecessary  
10 for me, and frankly improper for me, to get into the issue of  
11 reformation and evidence as to the parties' intent at the time  
12 of forming the contracts, since as I've found, the parties'  
13 intent is clear from the contracts themselves, and as I've  
14 ruled, requires the grant of the insurers' motion.

15           So, I will ask counsel for ACE to submit an order  
16 granting its motion for summary judgment in the three respects  
17 that I've ruled on: first as to the 2002 policy, second as to  
18 the retention policies, and third as to the plain meaning of  
19 the deductible policies, and consequently, denying the motion  
20 for summary judgment by the Michigan defendants.

21           You don't need to settle that order formally on notice  
22 to the Michigan defendants and DPH, but you should e-mail a  
23 copy to them before you e-mail it to chambers so that they can  
24 make sure it's consistent with my ruling.

25           MR. KAMENEC: Yes, Your Honor.

1 THE COURT: And you don't need to repeat all the  
2 conclusions of law set forth in my bench ruling, just refer to  
3 the bench ruling.

4 MR. KAMENEC: We will do that, Your Honor.

5 THE COURT: As I often do when I give a long bench  
6 ruling, I will look at the transcript of the ruling, and I may  
7 edit it, not only for typos, and miscitations but for content.  
8 If I do that, I will file it separately as a separate bench  
9 ruling, which won't be the transcript but rather an amended and  
10 corrected bench ruling. But the holding won't change so you  
11 don't need to wait for that process before you can send up the  
12 order.

13 MR. KAMENEC: Understood, Your Honor.

14 THE COURT: Okay. Thank you.

15 MR. HOGAN: Your Honor, if I could, just one brief  
16 housekeeping matter, Al Hogan again for DPH Holdings. Just in  
17 terms of taking stock of where we are in the adversary  
18 proceeding at this point for a moment --

19 THE COURT: Right.

20 MR. HOGAN: -- I believe that Your Honor's order today  
21 will resolve all of the affirmative claims that the insurer  
22 sought in the adversary proceeding, but I'll confer Mr. Olshin  
23 on that.

24 I also believe that Your Honor's ruling will dispose  
25 of the counterclaim that the Michigan defendants asserted in

1 their response to the adversary proceeding, and we can work  
2 that out.

3 THE COURT: To enforce the policy.

4 MR. HOGAN: To enforce the policies.

5 THE COURT: Right.

6 MR. HOGAN: In addition, Your Honor, DPH Holdings  
7 filed counterclaims and cross claims against the insurers and  
8 the Michigan defendants, respectively, the basic point of which  
9 was that assuming that Your Honor ruled that there was no  
10 coverage under the deductible policies for subsidiaries that  
11 were otherwise self-insured, then the insurers would have no  
12 right of recovery that -- against DPH Holdings on an  
13 administrative claim basis.

14 Stepping back, Your Honor, the reason we've been here  
15 in this court --

16 THE COURT: No, I understand.

17 MR. HOGAN: Right. And so we haven't filed a motion  
18 on that yet. I just wanted to flag the issue, but I don't  
19 think Your Honor's ruling today necessarily, as a matter of  
20 what you ruled today, disposes of all the claims. Having said  
21 that, what I'm going to do is I'm going to reach out to Mr.  
22 Olshin, talk with him and see if it does. If it doesn't, we'll  
23 advise you of that, I'll advise you of that in some way, shape  
24 or form.

25 I'll consider what the effect is on our cross claims

1 against Michigan. They didn't respond to those directly, but I  
2 don't think they've ever asserted that under the Form 400  
3 there was a way to come back against DPH. The bottom line  
4 point is here --

5 THE COURT: That was the whole point of it being  
6 separate.

7 MR. HOGAN: That's right. So the bottom line point is  
8 I think this ruling may very well effectively end all of the  
9 adversary proceeding. I'll confer with counsel to see if  
10 that's the case, and when Mr. Olshin submits the order, he may  
11 indicate to here to whether that is in fact their final order.

12 THE COURT: Well, if the order wants to contain a  
13 provision that grants you your relief on the counterclaim,  
14 that's fine with me. Given the prior history in this case, I'm  
15 quite confident that that is not going to be the last ruling,  
16 and that there will be an appeal. And I -- it isn't before me,  
17 but it's likely that if it didn't, if the order didn't have  
18 that tying up of that one loose end, I probably would still  
19 permit an appeal under Rule 54, so I don't think that should  
20 enter your strategy at all in dealing with this, I'm saying to  
21 all of you. It's really a pretty -- an issue from the Michigan  
22 insurers' issue, so otherwise, you know, that's just off the  
23 top of my head, but I have a feeling that I would permit an  
24 appeal under Rule 54, notwithstanding that it would only be  
25 resolving some and not all of the adversary.

1 MR. HOGAN: I understand, Judge, and just flag the  
2 issue. We may have a resolution when the order --

3 THE COURT: Right, and that's fine.

4 MR. HOGAN: -- comes in and if we --

5 THE COURT: I mean, it logically makes sense to tie  
6 that up, as opposed to having -- tied up by stipulation.

7 MR. HOGAN: Right.

8 THE COURT: If you want to have a separate stipulation  
9 too, it says, if in fact this order is final, then we waive,  
10 you know, then DPH gets its judgment.

11 MR. HOGAN: Okay. Thank you, Judge.

12 THE COURT: Thank you.

13 (Concluded at 2:34 PM)

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I N D E X

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CERTIFICATION

I, Sheila G. Orms, certify that the foregoing is a  
correct transcript from the official electronic sound recording  
of the proceedings in the above-entitled matter.

Dated: October 18, 2012

Signature of Approved Transcriber

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501